Supreme Court, U.S.
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No._____

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In The
Supreme Court of The United States
October Term 1997

STEPHEN MICHAEL RIDDER
Petitioner.

v.

CITY OF SPRINGFIELD, et al.
Respondent.

On Petition For Writ of Certiorari
To the United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1: Whether a political subdivision violates a person's civil rights under 42 U.S.C. §1983, when said person presents at the political subdivision's jail, displaying an obvious need for serious medical care of a particularized nature, and informs the jail physician, nurse and other personnel, of this condition and of the medical care required, and said jail employees are deliberately indifferent to such needs and fail to provide the required care.

QUESTION 2: Whether a person's civil rights are violated by a jail physician under 42 U.S.C. §1983, when said person presents to the jail in which the physician is employed as a physician, displaying an obvious need for serious medical care of a particularized nature, and informs the jail physician of this condition and of the medical care required, and said physician fails to provide the required care.

QUESTION 3: Whether the conduct of a United States Magistrate prejudices a plaintiff and effectively denies that plaintiff substantial justice when the Magistrate requires the plaintiff to adhere to more stringent pleading requirements than those required by Federal Rule of Civil Procedure 8, precludes the possibility of filing further amendments to the Complaint, applying Federal Rule of Civil Procedure 26(a)(2), as amended December 1, 1993 to the plaintiff's action filed in 1990, displays open hostility to the plaintiff's counsel, and allows personal feelings towards the plaintiff's counsel to influence his disposition of the plaintiff's case.

QUESTION 4: Whether a person's civil rights are violated by a municipality under 42 U.S.C. §1983, when the municipality displays a policy by which the municipality drafts inaccurate search warrant affidavits, and ignores salient exculpatory evidence in victim complaint sheets, in order to achieve an arrest of its target suspect.

QUESTION 5: Whether individual law enforcement officials violate a person's civil rights under 42 U.S.C. §1983, when the officials fail to investigate known exculpatory evidence, omit such known exculpatory evidence from a search warrant affidavit, and despite such known exculpatory evidence, hold the person in jail for four months.

PARTIES

1. For Petitioner: Stephen Michael Ridder, Plaintiff-Appellant.

2. For Respondents: City of Springfield, Ohio; Clark County, Ohio; Gene A. Kelly; Roger Evans; Robert Marcum; Ronald Menda; Robert Kerr; Dr. Walter Lawrence, Defendant-Appellees.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, filed in Case No. 95-3358, March 13, 1997, is unreported and reproduced at App. 1. The opinion of the United States Magistrate for the United States District Court for the Southern District of Ohio, Western Division at Dayton, filed in Case No. C-3-90-003, February 28, 1995, is unreported and reproduced at App. 163.

STATEMENT OF JURISDICTION

The United States District Court for the Southern District of Ohio had proper jurisdiction over Petitioner's claims pursuant to 42 U.S.C §§ 1983 and 1985, and 28 U.S.C. §1343(a)(3), and properly exercised supplemental or pendent jurisdiction of those claims of Petitioner that arose under state law. Jurisdiction over all parties existed, and venue was proper before the United States District Court for the Southern District of Ohio, Western Division at Dayton, pursuant to S.D.Ohio L.R. 3.3.

The case was properly referred for adjudication by the United States Magistrate by Order of February 8, 1990. App. 12

A final judgment was entered against Petitioner by the United States Magistrate for the Southern District of Ohio, Western Division at Dayton, on February 28, 1995. Thus, the United States Court of Appeals for the Sixth Circuit had jurisdiction to entertain an appeal, which was brought pursuant to 28 U.S.C. §1291.

Petitioner filed a timely appeal with the United States District Court for the Southern District of Ohio, Western Division at Dayton, on March 22, 1995.

A final judgment was entered by the United States Court of Appeals for the Sixth Circuit affirming the decision of the District Court, on March 13, 1997.

Plaintiff filed a timely Petition for Rehearing, which was denied on April 28, 1997. App. 191. Thus, the Supreme Court of the United States has jurisdiction to review the judgment of the Sixth Circuit by writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST., amend IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...

U.S. CONST., amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST., amend. XIV, § 1

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or

other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

- **Ohio Revised Code §341.01**

The sheriff shall have charge of the county jail and all persons confined therein. He shall keep such persons safely, attend to the jail, and govern and regulate the jail according to the minimum standards for jails in Ohio promulgated by the department of rehabilitation and correction.

STATEMENT OF THE CASE

This is the tragic tale of a man accused and incarcerated for crime he obviously did not commit. While at work one summer day in 1988, the power saw that Petitioner, Stephen Ridder, was operating became jammed, causing him to lose control of the saw. The saw tore through Ridder's left hand, nearly severing it completely. Ridder was rushed to the Mercy Hospital Emergency Room in Springfield, Ohio, where doctors reattached his severed hand. As Ridder sought treatment for his gruesome injury, Kim Carr, a hospital employee who had been the alleged victim of a "reportedly attempted" rape two years prior, heard Ridder's voice and "thought" that it "sounded like" the voice of her attacker. Therefore, Carr immediately notified law enforcement officials of this perception.

Ridder underwent the first of a number of scheduled surgeries on the hand that had been severed and reattached. Due the seriousness of the injury and so the hand to reattach and heal properly, intensive future medical treatment was required, including future surgeries and a three-times-per-week physical therapy regimen. This physical therapy was scheduled at Miami Valley Hospital for an extended period of time, including the entire time Ridder was incarcerated. The physical therapy facilitated the proper development and exercise of the muscles and tissues of the damaged limb and served to prevent the formation of scar tissue prior to upcoming surgeries. Ridder received regularly-scheduled therapy until the time of his arrest and had no scar tissue on his hand.

After Kim Carr's vague statement and information supplied by an unidentified and uncorroborated informant, the investigation of Ridder was begun by Springfield Police Department Detectives Robert Kerr and Ronald Menda, Sergeant Robert Marcum and Chief of Police Roger Evans. The investigation included interviewing the alleged victims,

showing the alleged victims a photograph of Ridder, and interviewing Ridder's former employer, Bob Mosier of Lawn Masters lawn care company.

On September 8, 1988, Detectives Kerr and Menda went to Ridder's home with a search warrant and took him to the police station for questioning. In a taped conversation, Ridder stated that he knew nothing about the rapes and informed the detectives that he was living in Florida and Michigan at the times that some of the rapes took place. Ridder also provided the detectives with specific dates and names of people he lived with and of employers they could contact to verify his statements. Furthermore, he told them that he did not return to Springfield until March of 1987, and that he was laid off from his job at Lawn Master lawn care service in November of 1987. The next day, Ridder again told the Detectives the same information to which they still did not make any reasonable inquiries.

In their zealous efforts to convict a man they believed to be the notoriously wanted "Northern Estates Rapist", Springfield law enforcement officials ignored exculpatory evidence and omitted or ignored blatant inconsistencies between the victim descriptions and their "evidence" allegedly implicating Ridder. This evidence, given before Ridder was arrested and easily verifiable, would clearly eliminate Ridder as a suspect in most of the rapes.

After offering exculpatory evidence, Ridder took part in a suspect line-up. However, only five out of eight victims identified Ridder as the <u>possible</u> rapist. After the sham line-up, Ridder was arrested and placed in the Clark County Jail. Ultimately, Ridder was charged on a fourteen (14) count Indictment. These acts, having the same *modis operandi*, allegedly occurred between January 5, 1986, and July 5, 1988, in the areas surrounding Springfield, Sidney, and Wapakoneta, Ohio. Respondents also allegedly announced through the news media that with the arrest of Ridder, the

"Northern Estates Rapist" had been apprehended and all could rest.

Also on September 8, 1988 and pursuant to the search warrant, Ridder provided samples of his head and pubic hair, saliva, and blood to a technician of the Springfield Police Department lab, so that forensic DNA testing could be done. The samples were provided to Cellmark Diagnostics in Maryland. The results of the testing were not made known until four months later, although Ridder alleged evidence that the results were known sooner.

Despite the standard policy and procedures that require an objective officer to retrieve and review a suspect's arrest and incarceration record for an investigation of this nature, Kerr admitted that Respondents did not request Ridder's FBI arrest and incarceration report until December, 1988, three months after the arrest.[1] Obviously, the facts indicated that Respondents deviated from the policy.

When Ridder was booked into the Clark County Jail, he fully disclosed his medical condition and needs to jail officials, and various jail officials had direct knowledge of Ridder's need for therapy, as well as how often and where the therapy was to take place. A receiving-screening form was filled out, dated September 8, 1988, and signed by Ridder, as is customary when inmates are taken in. Question 26 asked "Do you have any other medical problem we should know about?" to which was written "<u>therapy on hand 3 days a week - Miami Valley - Dayton</u>". (emphasis added). Jail Nurse Mary McNier testified in deposition that when a screening form was received, the policy and practice was to make a chart for the inmate, and place the chart and form on the jail doctor's desk for the doctor to review prior to examining the inmate. Nurse McNier made an entry dated

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[1] Although the arrest record was dated October 22, 1988, a serious question of credibility of the officers existed as to when the Respondents received the information contained in the FBI arrest record.

9-9-88 in the pass-on book, which informs staff of actions to be taken for an inmate, that Ridder needed therapy three times a week.

Respondent Walter Lawrence was the "jail doctor" at the Clark County Jail during Ridder's incarceration. Though Ridder was arrested on September 8, 1988 and fully disclosed his medical condition, Lawrence did not examine Ridder until September 14, 1988. When Lawrence finally examined Ridder, he determined that Ridder had a "severe debilitating injury to his hand, that he had lost function of his blood vessels, of his nerves, of his tendons." Lawrence specifically noted an insufficient blood supply to the hand and that it was pale. Ridder also reiterated his need for therapy three days a week and the fact that he had not had any pain medication since his arrest and needed some to alleviate his increasing pain. Lawrence replied by telling Ridder that they were not going to take him for his therapy and "that once Ridder was in the penitentiary he would receive proper care at that time."

Ridder did not receive any of the required physical therapy until late October, 1988, well over a month after Lawrence's initial examination. In spite of Lawrence's knowledge of Ridder's medical condition, there were no notes concerning Ridder in the medical staff's pass-on book from September 15 through October 25.

Also while incarcerated, Ridder finally had to undergo surgery in which a sural nerve was taken from his leg and placed in his damaged hand in an attempt to restore its full use. Following Ridder's surgery on November 28, 1988, Dr. Barre gave a list of post-operative instructions to the deputies who were guarding Ridder. Although the jail personnel had actual knowledge of Ridder's severe medical condition, his immediate needs and the post-operative instructions, the necessary care was not provided.

During the remainder of his stay in jail, Ridder's condition deteriorated. Ultimately, Ridder was required to

have numerous surgeries to his hand and leg. To date, Ridder has a permanent disability in both limbs.

On January 4, 1989, Stephen Ridder was advised by his pubic defender that the DNA test results had been received from Cellmark Diagnostics. Ridder was informed that the DNA test conclusively proved that he was not the culprit in the alleged rapes, and that he was to be released in an hour. Ridder was released, and the charges against him were dismissed without prejudice on January 12, 1989.

This case was commenced with the filing of Ridder's Verified Complaint on January 4, 1990, launching a procedural odyssey that has spanned seven years, five of which was in the District Court where the case was practically dormant. App. 193. Suit was brought against the City of Springfield, Ohio; Clark County, Ohio; Stephen A. Schumaker, individually and in his capacity as the Prosecuting Attorney of Clark County, Ohio[2]; Gene A. Kelly, individually, and in his capacity as Sheriff of Clark County, Ohio; Roger Evans, individually, and in his capacity as Chief of Police of the City of Springfield, Ohio; Robert Marcum, individually, and in his capacity as a Sergeant of the Springfield Police Department; Ronald Menda, individually, and in his capacity as a Detective with the Springfield Police Department; Robert Kerr, individually, and in his capacity as a Detective of the Springfield Police Department; and Dr. Walter Lawrence, the jail doctor during Ridder's incarceration.[3]

The Verified Complaint advanced nine causes of action, seeking compensatory and punitive damages. The

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2 By Entry of May 5, 1995, Ridder voluntarily dismissed the appeal below as it pertained to Schumaker.

3 No additional "John or Jane Does", as mentioned in the Complaint, were added as Defendants during the pendency of the suit prior to its dismissal by the Magistrate.

primary claims were brought pursuant to 42 U.S.C. §§1983 and 1985, and state law medical malpractice claims against Lawrence. The Verified Complaint also contained very specific factual allegations and bases for the legal theories and causes of action.

The case was referred for adjudication to United States Magistrate Michael Merz by Order of February 8, 1990. Beginning in April, 1990, Respondents filed Motions to Dismiss and for Judgment on the Pleadings. In these Motions, Respondents asserted that the allegations in the Verified Complaint were insufficient for them to know what they were to defend against, despite the facts and other specific allegations therein.

By Decision and Entry of September 10, 1990, the Magistrate deferred ruling on these Motions pending the filing by Ridder of an Amended Complaint. App. 18. In the Decision and Entry, the Magistrate held that Ridder had not pled with the requisite specificity so as to allow the Court to rule on the defenses of qualified and absolute immunity, thereby subjecting Ridder to a heightened pleading requirement, forcing him to go beyond notice pleading in order to engage in discovery.

Ridder's First Amended Verified Complaint was filed on October 1, 1990. App. 216. In addition to adding claims against Lawrence individually, the First Amended Verified Complaint fleshed out the supposedly insufficient allegations of the original Complaint by adding some eight pages and twenty-four paragraphs of facts and specific claims of wrongs done to Ridder by Respondents. Respondents renewed their previous Motions to Dismiss and for Judgment on the Pleadings, alleging that the Amended Complaint was insufficiently pled. The Magistrate then set the matter for hearing, taking the extraordinary step of ordering Ridder to file a Memorandum of Law outlining and explaining the First Amended Verified Complaint. This Memorandum was filed on December 4, 1990.

Some fifteen (15) months after the filing of the Memorandum of Law, the Magistrate finally ruled on the pending motions, as well as a Motion for Summary Judgment that was filed by Ridder on March 28, 1991. In his Decision and Entry of March 4, 1992, the Magistrate dismissed virtually all causes of action pled in Ridder's First Amended Complaint. App. 27.

Ridder then sought and was granted leave to file a Second Amended Verified Complaint. The Second Amended Verified Complaint was then filed on May 7, 1992.[3] App. 296. In response, Respondents filed Motions for More Definite Statements and for Judgment on the Pleadings. The Motion for More Definite Statement was granted June 10, 1992. App. 50. The Magistrate also decided *sua sponte* that the filing of the Second Amended Verified Complaint constituted a violation of 28 U.S.C. §1927, in that it multiplied proceedings vexatiously and unreasonably, and held Ridder liable for the costs and fees incurred by Respondents Clark County and Kelly, inviting them to apply for such fees. Such application was made on June 17, 1992.

On August 17, 1993, Ridder was granted leave to file and filed the same day a Third Amended Verified Complaint. App. 343. In the Order granting leave, the Magistrate also made moot all pending Motions directed toward prior pleadings, including the Motions for Costs, etc. Thereafter, the case was finally able to proceed to discovery. The Magistrate reviewed the pleading history of the case up to that point, and, determining that the pleading difficulties were entirely the fault of Ridder, held that no further amendments to the pleadings would be permitted, and that

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[3] This included not only liability issues concerning the City of Springfield based upon not only violations of clearly established constitutional law in failing to follow procedures or develop appropriate procedures, but under *respondeat superior* pursuant to Ohio law.

Ridder was to "stand or fall on the Third Amended Complaint." App. 77-78.

On February 15, 1994, the Magistrate entered a Scheduling Order setting pertinent dates for the proceeding of the balance of the case. App. 103. In the Scheduling Order, the Magistrate referred to the December 1, 1993 Amendment to Federal Rule of Civil Procedure 26 regarding expert reports and witnesses. Ridder had previously supplied his expert witnesses and their reports under existing Federal and Local Rules and Ridder certainly believed that all prior disclosures left the case in a position where it could be tried on the merits. However, when the deadline for submission of the reports arrived, Ridder's counsel provided the reports that were in counsel's possession only to opposing counsel, and the reports did not comply with the new Fed. R. Civ. P. 26(a)(2), as amended December 1, 1993. The reports complied with the pre-amendment law applicable when the case was filed.

The Magistrate, again and *sua sponte*, issued an Order striking some of Ridder's experts and giving Ridder six (6) days from the date of filing of the decision in which to provide reports from the experts which complied with the amended Fed. R. Civ. P. 26(a)(2). Ridder then provided the requested reports and supplements to the Magistrate, along with a Motion to allow another expert to testify, whose report had previously been provided to opposing counsel and the Court.

The Magistrate then entered an Order on June 2, 1994, striking the reports of all of Ridder's proposed experts and barring their testimony, with the exception of Respondents, who had previously been designated as expert witnesses, and Richard Emmons, if Ridder could produce a report from Emmons complying with amended Fed. R. Civ. P. 26(a)(2). App. 112. Ridder then filed a Motion for Modification of the Order and Decision, which requested that the Magistrate revise his prior decision and allow the experts

at issue to testify. In his Decision and Order of July 11, 1994, the Magistrate denied the Motion, without prejudice to renewal, contingent upon Ridder setting forth more fully in an affidavit the raised claims of excusable neglect, and offering of expert reports which conform with amended Fed. R. Civ. P. 26(a)(2). App. 122. Of critical importance was the fact that the Magistrate placed no time limit on when this was to happen.

Recognizing that the Magistrate was directing his personal ire toward Ridder's counsel and in an attempt to see that Ridder received justice, Ridder submitted a Motion for Renewal of Prior Motion for Modification and Notice of Filing Expert Reports on January 23, 1995, which were more fully developed on January 30, 1995. In his Second Order Regarding Motion for Modification, the Magistrate stated that he would accede to only a portion of the relief requested in Ridder's Motion if Respondents concurred. App. 153. None of Respondents agreed to any of the requested relief, and therefore, by the Magistrate's Third Order Regarding Motion for Modification, Ridder's Motions for Modification and Other Relief were overruled in their entirety. App. 159.

Discovery continued and the case finally inched its way into the pre-trial preparation phase. On February 28, 1995, the Magistrate granted Respondents' Motions for Summary Judgment in full, just prior to the scheduled trial date. App. 163. Ridder then timely filed his Notice of Appeal with the trial court.

The United States Court of Appeals for the Sixth Circuit affirmed the decision of the Magistrate on March 13, 1997. In doing so, several of the arguments raised were not addressed. Petitioner Stephen Ridder respectfully requests that this Honorable Court review the decision of the Sixth Circuit.

ARGUMENT

Entry of summary judgment in favor of Respondents in this matter has amounted to a gross miscarriage of justice. The Petitioner has, at every stage of the proceeding, put forth genuine issues of material fact that must preclude summary judgment as to all Respondents. The decision rendered by the Sixth Circuit in this case conflicts with recent decisions of other circuits and of the Sixth Circuit itself. Furthermore, Petitioner's fundamental constitutional and civil rights are implicated in this action. Petitioner was accused of horrible crimes that he clearly did not commit and served four months in jail, where an obviously serious medical condition was deliberately ignored by jail officials. The ordeal naturally had profound and permanent effects on the mental, emotional, and physical states of Petitioner.

Respondents abused their governmental power and the Petitioner suffered greatly from the affects of that abuse. By denying Petitioner his right to try his claims in front of a jury of his peers, the lower courts have turned their backs on a fundamental role of the judiciary in this country. Petitioner has been denied the protection of his most fundamental rights, his day in court. The facts and witnesses presented precluded the granting of summary judgment.

QUESTION 1: Whether a political subdivision violates a person's civil rights under 42 U.S.C. §1983, when said person presents at the political subdivision's jail, displaying an obvious need for serious medical care of a particularized nature, and informs the jail physician, nurse and other personnel, of this condition and of the medical care required, and said jail employees are deliberately indifferent to such needs and fail to provide the required care.

Municipal liability can also attach to Respondent Clark County, Ohio, because of the deliberate indifference as

to the serious medical needs of Petitioner, and its deliberate indifference in the training of its employees and agents regarding the medical care of inmates. Liability also ensues to Respondent Kelly as sheriff of the county in whose jail Petitioner was held, as well as Dr. Lawrence the jail physician. The policy necessary to attach liability to a municipality may be established by showing a conscious indifference to the constitutional rights of persons with whom the police come into contact. *City of Canton v. Harris*, 489 U.S. 378 (1989). A prisoner's Eighth Amendment right to medical care prohibits jail officials from ignoring or disregarding medical care already prescribed by a physician. *See Martinez v. Mancusi*, 443 F.2d 921 (2d Cir.), *cert. denied*, 401 U.S. 983 (1970); *Hirons v. Director, Patuxent Institution*, 351 F.2d 613 (4th Cir. 1965); *Campbell v. Beto*, 460 F.2d 765 (5th Cir. 1972).

When Petitioner arrived at the Clark County Jail, it had been only two months since his hand was severed and reattached. Scarring and discoloration of the limb was readily noticeable, as evidenced by the observations of Respondent Lawrence when he examined Petitioner weeks after his arrest. Furthermore, Petitioner made that condition and the treatment necessary thereto known to jail officials. Petitioner was not permitted to attend the physical therapy which was necessary for his hand to properly reattach. Petitioner, on numerous occasions, requested pain medication, which had been prescribed by his surgeon, to alleviate the pain that accompanied the healing of his reattached hand. Jail officials did not provide Petitioner with the needed medication or absolutely prescribed therapy until he had been incarcerated for months, thereby causing permanent damage to his injured limbs.

Moreover, following the nerve transplant surgery endured by Petitioner during his incarceration, Petitioner repeatedly requested in compliance with Dr. Barre's orders material with which to elevate his leg, as well as ice to apply

to his post-operative wounds. The requests were made to various jail personnel and were made pursuant to the post-operative treatment instructions given by Petitioner's surgeon. Jail officials replied that they would see what they could do, but clearly did not take the medical needs seriously, since the requests were never honored.

Further evidence of the indifference of jail personnel to the medical needs of Petitioner is found in their response to the bandaging of Petitioner's post-operative wounds. Petitioner's surgeon instructed that Petitioner's bandages were to be changed every twenty-four (24) hours. This treatment was prescribed by Petitioner's physician, and by law, was to be carried out by jail personnel. *Martinez*, *supra*; *Hirons*, *supra*. In actuality, however, the bandages were not changed initially until three days after the surgery, and then only three more times, every other day.

The way in which the medical needs of Petitioner were handled, particularly the failure of jail personnel to adhere to treatment prescribed by Petitioner's physicians, demonstrates a pervasive, general indifference on the part of the jail officials. Such blatant indifference as to several individual needs of a severely injured inmate, as acquiesced in by Clark County, illustrates the County's deliberate indifference to the medical needs of those incarcerated in its jail. Also, failure to train county personnel as to the medical care of inmates, can be inferred by such flagrant disregard for an inmate's needs. The right to reasonable medical care while in custody is so fundamental that governments must train their officials as to the provision of such care. Where the conduct of jail officials falls so egregiously below the standard of care required as it did in this case, failure to train may be inferred. In this case, it cannot be said that a reasonable interpretation of the evidence disclosed that Respondents cruel treatment inflicted upon Ridder was actually punishment for his alleged status as a notorious rapist by his capturers.

Supplemental jurisdiction existed over state law claims against Respondent Kelly. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Under Ohio law, Respondent Kelly, as Sheriff of Clark County, possessed an affirmative duty to see to it that inmates in the Clark County Jail receive needed medical care. *See* Ohio Revised Code §341.01 and the mandatory Jail Requirements promulgated therein. Petitioner entered the jail with an obvious, serious medical condition, which he made known to jail officials. The sheriff has a mandatory duty to provide reasonable medical care to inmates. The required care, as prescribed by Petitioner's physicians, was not provided, and so liability inured to Respondent Kelly.

Petitioner required specific treatment in order for his hand to properly reattach and heal. Although personal physicians issued personal instruction as to this care, such care was not provided. Petitioner will never have the full mobility of his damaged hand. Thereafter, surgery on his ankle was necessary to obtain tissue for the hand and the ankle surgery also failed. Clark County and its prison officials simply cannot be relieved of liability for completely ignoring Petitioner's serious medical needs while he was an inmate of the County Jail. Indeed, under the doctrines of successive tortfeasors and joint and several liability, Respondents can call be held liable.

Finally, there certainly was sufficient evidence of the medical malpractice of Dr. Lawrence under the Ohio law to go to a stay or be remanded to state court claim alone. *Bruni v. Tatsumi* , 46 Ohio St. 2d 127 (Ohio 1976).

QUESTION 2: Whether a person's civil rights are violated by a jail physician under 42 U.S.C. §1983, when said person presents to the jail in which the physician is employed as a physician, displaying an obvious need for serious medical care of a particularized nature, and informs the jail physician of this condition and of the medical care

required, and said physician fails to provide the required care.

Petitioner has established the individual liability of Respondent Lawrence under §1983 as well as under state medical malpractice law. The Sixth Circuit's decision affirming the grant of summary judgment as to Respondent Lawrence contradicts recent decisions of other circuits and the Sixth Circuit itself. The due process clause of the Fourteenth Amendment requires governmental agencies to provide medical care to pretrial detainees by administering prompt medical attention once the government is aware of the need for such attention. *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244-5 (1988). As this Court held in *Estelle v. Gamble*, 429 U.S. 97 (1976), prison officials may not be deliberately indifferent to the medical needs of their prisoners. *See also Fitzke v. Shappell*, 773 F.2d 720 (6th Cir. 1972); *Sosebee v. Murphy*, 797 F.2d 179 (4th Cir. 1978).

Section 1983 liability requires a showing of deliberate indifference to the plaintiff's medical needs. *Estelle*, 429 U.S. 97. In order to establish deliberate indifference, the prison officials need not have consciously sought to inflict pain by withholding treatment, but more than mere negligence must exist. *Id.*

Petitioner clearly displayed a serious medical need at the time of his arrest, as evidenced by the report of his condition on his initial screening form. A need for scheduled therapy which is in direct preparation for future surgery, and which is necessary to facilitate proper healing is unquestionably a serious medical need. Not only was Petitioner not permitted to attend his physical therapy, but Respondent Lawrence plainly told Petitioner that he would not be transported to the hospital for his therapy, and that he would receive proper care once he was in prison. Petitioner was not given pain medication despite repeated requests

from him as well as his treating physician. Even his requests for material with which to elevate his leg following surgery were ignored. After his initial examination of Petitioner, Respondent Lawrence never saw Petitioner again. Despite his awareness of the serious medical needs of Petitioner, Respondent Lawrence did nothing. As the Sixth Circuit and other circuits have held, such inaction by prison officials amounts to deliberate indifference for the purpose of establishing §1983 liability.

Furthermore, granting summary judgment to Respondent Lawrence on Petitioner's state law claims for medical malpractice was inappropriate. A prima facie case of medical malpractice requires a showing that the injury complained of was caused by the omission or failure to do some particular thing or things that a similar physician would have done under similar circumstances, and that the injury was the proximate result of the omission. *Bruni v. Tatsumi*, 46 Ohio St.2d 127. Reckless or indifferent conduct also constitutes medical malpractice under Ohio law. *Newton v. Ohio University School of Osteopathic Medicine*, 91 Ohio App.3d 703 (Ohio Ct. App. 1993).

Supplemental jurisdiction existed over Petitioner's state law claims, as the factual allegations which served as the basis for the §1983 claims also established medical malpractice. As discussed above, Petitioner has demonstrated a complete failure by the Respondents to properly treat and care for Petitioner's medical needs. Petitioner's liberty had been taken away from him. Once in the custody of Respondents, Petitioner could no longer adequately provide for his own medical care. Though he was in their care, Respondents were indifferent to his serious medical needs. Those needs were obvious, they were documented and they were relayed verbally to prison officials, including Respondent Lawrence, by Petitioner.

QUESTION 3: Whether the conduct of a United States Magistrate prejudices a plaintiff and effectively denies that plaintiff substantial justice when the Magistrate requires the plaintiff to adhere to more stringent pleading requirements than those required by Federal Rule of Civil Procedure 8, precludes the possibility of filing further amendments to the Complaint, applying Federal Rule of Civil Procedure 26(a)(2), as amended December 1, 1993 to the plaintiff's action filed in 1990, displays open hostility to the plaintiff's counsel, and allows personal feelings set forth in the record towards the plaintiff's counsel to influence his disposition of the plaintiff's case.

In the case at bar, the conduct of the United States Magistrate prejudiced Petitioner in his pursuit of claims of violations of his civil and constitutional rights. The Magistrate displayed open hostility to Petitioner and his counsel, made improper procedural rulings which eviscerated Petitioner's case, and allowed his personal feelings toward Petitioner's counsel to surface and influence his disposition of the matter. By finding no impropriety in the Magistrate's conduct, the Sixth Circuit has departed from accepted standards set forth by this Court regarding the impartiality of decision-makers.

As pointed out above, with respect to Petitioner's §1983 claims against the individual Respondents, the Magistrate held Petitioner to a more rigid pleading standard than the standard set forth in Fed.R.Civ.P. 8. Furthermore, if a higher pleading standard was necessary as to some of Petitioner's claims, the Magistrate held Petitioner to an arbitrary standard, requiring even more than that which federal courts have determined that heightened pleading standard to be.

Furthermore, the impatience of the Magistrate, as well as the way in which the Magistrate's impatience manifested itself, is typified by the Order entered January

24, 1994. In that Order, the Magistrate reviewed the pleading history of the case to that point, determined that the pleading difficulties to that point were solely the fault of Petitioner, and stated:

> Accordingly, no further amendments of the pleadings will be countenanced. Plaintiff has now had four opportunities over four years to plead his case; the case, and individual claims within it, must stand or fall on the Third Amended Complaint.

App. 77-78. First, the blame for the length of time elapsed by the pleading stage of the case cannot fall exclusively upon Petitioner. Among other delays, the Magistrate took seventeen (17) months to rule on pending motions to dismiss and for judgment on the pleadings, from October, 1990, until March of 1992. The Magistrate himself, after years of chastising Petitioner for the length of time expended in the case, in an Order entered January 25, 1995, stated:

> However, the Court must also accept responsibility for taking too long to rule on the various motions to dismiss and again apologizes for the delay.

App. 138, n.1.

Furthermore, what occurred in the January 24, 1994 Order was that the Magistrate lost patience and arbitrarily decided that Petitioner could not ever again amend the Complaint, though the Federal Rules of Civil Procedure specifically provide plaintiffs with the ability to do so. Fed.R.Civ.P. 15(a) provides that a plaintiff may amend his or her Complaint once as a matter of course before responsive pleadings are filed, and then after that with leave of court. Leave of court "shall be given freely when justice so requires." Fed.R.Civ.P. 15(a). Federal courts have consistently held that such leave should be liberally granted, and that the decision of whether to grant a motion to amend is within the discretion of the trial court. *Norman v. Apache Corp.*, 19 F.3d 1017 (5th Cir. 1994); *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979 (6th Cir. 1991). Denials of

leave to amend are to be reviewed for abuse of discretion. *Norman*, 19 F.3d 1017; *Miller*, 925 F.2d 979.

It is one thing to deny leave to amend when a motion is made, accompanied by a memorandum containing the arguments for granting said motion. It is quite another thing to lay down a blanket rule at some point in the pleading stage, which forbids a plaintiff from doing something that the Federal Rules permit him to do. The Magistrate's stating that Petitioner's claims had to "stand or fall" with the Third Amended Complaint ignores, and even contradicts the liberality of Fed.R.Civ.P. 15. The anticipatory denial of leave was arbitrary and capricious, and amounted to an abuse of the magistrate's discretion.

There are countless reasons why a plaintiff may need to amend the Complaint at some point in the proceeding, or why a plaintiff may desire to do so in order to adequately pursue his or her claims. Petitioner should not have been faced with this brick wall, this unfairly erected barrier to his pleading. The Order serves as an example of the Magistrate's growing intemperance, and contempt for Petitioner and counsel.

Additionally, the Magistrate's desire to perfunctorily rid his docket of Petitioner's case was demonstrated by his applying Fed.R.Civ.P. 26(a)(2), as amended December 1, 1993 to the case. The case was pending at the time of the adoption of the Rule, and some of the expert reports that were held to the new standard had already been provided prior to that adoption.

The instant matter had been pending for nearly four (4) years when Rule 26 was amended. Drs. Kaehr, Barre, Duncan, and Sammarco were disclosed as expert witnesses because of their status as the treating physicians of Petitioner. As the Advisory Committee Notes point out, treating physicians may provide testimony without any requirement for a written report. Furthermore, the report of one of Petitioner's investigators, Richard Emmons, had been

provided to the court and opposing counsel as an attachment to Petitioner's Motion for Summary Judgment, filed in March, 1991. App. 262.

The exclusion of all of Petitioner's proposed expert witnesses (except for Respondents), completely eviscerated Petitioner's case, and amounted to an abuse of discretion. Fed.R.Civ.P. 26(a)(2) provides, in pertinent part:

> (A) ...a party shall, disclose to the other parties the identity of any person who may be used trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.
>
> (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case...be accompanied by a written report prepared and signed by the witness...

(emphasis added). In the case at bar, several of Petitioner's proposed witnesses were not retained or specifically employed to provide expert testimony, but were disclosed because of their status as Petitioner's treating physicians. The Advisory Committee Notes to the amended rule stated: "a treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report." Therefore, the application of the rule to the treating physicians was erroneous.

Furthermore, the application of the amended rule to the case at bar worked an injustice on Petitioner. Amendments to the Federal Rules of Civil Procedure may be applicable to then-pending cases, unless "to the extent that in the application of such rule in such proceedings would not be feasible or would work injustice..." 28 U.S.C. §2074 (emphasis added). Indeed, in adopting the amendment to Fed.R.Civ.P. 26 at issue herein, this Honorable Court stated that "this and all other rules amended effective December 1,

1993, are applicable to litigation pending on that date insofar as just and practicable." *Order adopting amendments to the Federal Rules of Civil Procedure*, 113 S.Ct. 475, 477 (1993) (emphasis added). It was inappropriate to apply the amended rule to the case at bar because of the drastic effect that doing so had upon Petitioner's case. Justice was deemed not served. The rule was applied to Petitioner's experts, most of whom did not fall into the categories of witnesses the rule covers, and the result was that all of Petitioner's proposed expert witnesses were barred from testifying. While Respondents never filed such reports, their experts were not barred.

The Magistrate's effort in helping defend this case on his own initiative made the presentation impossible. This Honorable Court should clearly enunciate a prohibition against such arbitrary, capricious, and unreasonable conduct. The exclusion of the experts prejudiced Petitioner, destroying his ability to present evidence proving his claims, especially the medical claims.

The Magistrate displayed open hostility and intemperance towards Petitioner's counsel, repeatedly chastising counsel and going so far as to mock counsel's pleading style, which upon review this Honorable Court will find more than acceptable. Such conduct, in light of personal ill will towards Petitioner's counsel, nullified the Magistrate's ability to render an impartial decision.

Moreover, the Magistrate disposed of this matter by entering summary judgment for all of Respondents and against Petitioner on all of his claims. He did so despite the fact that some 13 months earlier, he had denied Respondents' Motion for Summary Judgment. Despite the fact that there were no changes made.

Petitioner was precluded from presenting the injustices done to him, along with expert opinions concerning his medical needs, as well as duties ignored by Respondents, to a jury of his peers. In affirming this

decision, the Sixth Circuit contradicted established standards intended to aid plaintiffs in pursuing claims of civil rights violations and avoided the serious issues of the Magistrate's conduct. The case at bar represents one of the grossest miscarriages of justice imaginable. The attempt to solicit the federal courts below for a meaningful remedy under the law has failed. Consequently, Plaintiffs pray that this Honorable Court grant Certiorari in the case at bar.

QUESTION 4: Whether a person's civil rights are violated by a municipality under 42 U.S.C. §1983, when the municipality displays a policy by which the municipality drafts inaccurate search warrant affidavits, fails to review or adhere to procedure for arrest records, and ignores salient exculpatory evidence in victim complaint sheets, in order to achieve an arrest of its target suspect.

Petitioner has met the requirements of 42 U.S.C. §1983 for liability to attach to the City of Springfield, and furthermore has established liability on the part of the City of Springfield pursuant to the doctrine of respondeat superior under Ohio law. Section 1983 liability requires plaintiffs to show: (1) a right secured by the United States Constitution; (2) a violation of that right; (3) by a person acting under color of state law. *Paul v. Davis*, 424 U.S. 693, 699-701 (1976); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992). In order to attach municipal liability under §1983, a plaintiff must also demonstrate that the right was violated pursuant to a custom or policy of the municipality. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694-695 (1978). Municipalities possess no immunity from suit under §1983. *Owen v. City of Independence*, 445 U.S. 622, 657 (1980). Furthermore, when pleading municipal liability under §1983, plaintiffs are required only to meet the simple, notice-pleading requirements of Rule 8 of the Federal Rules of Civil

Procedure. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). Liability under §1983 cannot arise from the doctrine of respondeat superior, and the municipality, through its policy or custom, must be a moving force in the complained of violation. *Monell*, 436 U.S. at 694.

The Supreme Court of Ohio explained the concept of *respondeat superior* in the case of *Osborne v. Lyles*, 63 Ohio St. 3d 326 (Ohio 1992). In that case, the state court established that under state law, *respondeat superior* liability against a municipality, like the City of Springfield, could be predicated upon the wrongful, even intentional, misconduct of a police officer. The basis for liability under pendant jurisdiction was totally ignored by the Magistrate and the Sixth Circuit.

Petitioner has established the basic elements of a §1983 action against Respondent City of Springfield. The city and its police officers were clearly state actors acting under color of state law throughout the criminal prosecution of Petitioner. *See Monroe v. Pape*, 365 U.S. 167, 171-172 (1961). Petitioner claimed violations of his constitutional rights guaranteed by the Fourth Amendment which protects persons from illegal searches and seizures, and from malicious prosecution. *See Dombrowski v. Pfister*, 380 U.S. 479 (1965) (malicious prosecution is actionable under the Fourth Amendment). Petitioner also raised claims of violation of his due process rights via the Fourteenth Amendment, and of cruel and unusual punishment in violation of the Eighth Amendment (made applicable to the states through the Fourteenth Amendment, *see Robinson v. California*, 370 U.S. 660 (1962)).

Petitioner has adduced evidence demonstrating unconstitutional policies of the City of Springfield which attaches §1983 liability to the City for the violations of Petitioner's civil rights. Respondents possessed information concerning Petitioner's whereabouts during some of the

rapes which proved conclusively that he could not have been the culprit. The procedures for review and use of arrest information was clearly and objectively violated. Respondents also possessed the victim's complaint sheets, which included physical descriptions of the women's attackers, descriptions which Petitioner could not possibly match. Although the alleged rapes had differing *modus operandi* and were committed by men with varying physical characteristics, Respondents sought to tie the crimes to one serial rapist. Notwithstanding the facts that Petitioner did not match the physical descriptions, and was not physically in the area of several of the alleged rapes when they occurred, Respondents had wrongfully focused all of their investigatory efforts on Petitioner, who had become their target suspect. Respondents exercised a policies, which as any reasonable person would objectively known, were a violation of Ridder's rights. Respondents ignored exculpatory evidence and failed to investigate known alibis in order to imprison their target suspect. Through the execution of this policy, Respondents violated the substantive due process rights of Petitioner, falsely imprisoning him and adversely affecting his life forever.

Moreover, the City of Springfield is liable for the violations of Petitioner's rights pursuant to the doctrine of respondeat superior. Although municipal liability cannot attach pursuant to respondeat superior under §1983, respondeat superior is a cognizable ground for municipal liability under Ohio law. *Osborne v. Lyles*, 63 Ohio St. 3d 326. Federal courts may exercise supplemental jurisdiction over claims arising under state law, where the state law claims stem from the same set of facts and circumstances as the underlying federal claim. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Pendent jurisdiction existed over Petitioner's state law claim of respondeat superior liability because both that claim and Petitioner's §1983 claims flow from Petitioner's

arrest and incarceration. Furthermore, in *Osborne v. Lyles*, the Ohio Supreme Court held that a municipal corporation may be held liable for the torts of its employees while acting within the scope of their employment. *Osborne*, 63 Ohio St.3d at 329. Similarly, Petitioner has suffered the tort of malicious prosecution at the hands of police officers employed by the City of Springfield. While zealously pursuing a conviction of their target suspect, despite a wealth of exculpatory evidence, the officers were clearly acting within the scope of their employment. Thus it is clear that under Ohio law, their indeed existed a basis for respondeat superior liability to attach to the City of Springfield.

As the foregoing demonstrates, there exist two separate and distinct legal bases for imposing liability upon the City of Springfield. By seeking relief from the city, Petitioner was merely exercising his rights under federal and state law, in an effort to hold accountable the parties responsible for the violation of his rights.

QUESTION 5: Whether individual law enforcement officials violate a person's civil rights under 42 U.S.C. §1983, when the officials fail to investigate known exculpatory evidence, omit such known exculpatory evidence from a search warrant affidavit, and despite such known exculpatory evidence, arrest and hold the person in jail for four months.

Respondents Evans, Menda, Marcum and Kerr are not shielded from liability in this matter by the doctrine of qualified immunity. When individual defendants in §1983 actions raise the defense of qualified immunity at the summary judgment stage, plaintiffs are faced with two hurdles that must be overcome in order to keep those individual defendants in the suit: (1) the plaintiff must put forth evidence sufficient to create a genuine issue as to whether the individual defendants committed acts which; (2)

violated clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Petitioner has put forth evidence that the individual Respondents ignored exculpatory evidence in order to procure a search warrant of Petitioner. At the time, it was clearly established law that all Americans possess the right, vested by the Fourth and Fourteenth Amendments to be free from unlawful searches and seizures, most notably from those resulting from clearly defective or fraudulently procured warrants. *Franks v. Deleware*, 438 U.S. 154 (1978). Pleading those facts was all that Petitioner was required to do to overcome the defense of qualified immunity.

The qualified immunity inquiry focuses on the objective reasonableness of the defendants' actions, and relieves those officials who possess the immunity from the burdens of being sued. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Some circuits have held that the purpose of the doctrine mandates that plaintiffs satisfy a higher standard of pleading regarding claims against individuals who raise qualified immunity. *Colle v. Brazos County, Texas*, 981 F.2d 237, 243 (5th Cir. 1993);*Veney v. Hogan*, 70 F.3d 917, 919 (6th Cir. 1995). However, in *Leatherman*, this Court expressly reserved consideration of the issue as to whether a higher standard of pleading is required for claims against individual defendants claiming qualified immunity. *Leatherman*, 507 U.S. at 166-167.

The district court required Petitioner to meet such a heightened standard in the instant case, and repeatedly held that Petitioner's pleadings did not meet this higher standard when the Complaint and even the Amended Complaint set forth sufficient allegations under any requirement of law. However, the higher standard merely requires that plaintiffs plead factual allegations which establish the two-prong test

for overcoming a defense of qualified immunity. *See Colle, supra.*

Petitioner has put forth facts which established the two-prong test for overcoming qualified immunity. In fact, as discovery progressed and as the Magistrate demanded more specificity, Petitioner amended his Complaint three (3) times, each time adding more paragraphs of specific facts detailing the Respondents' violations of Petitioner's rights, further expanding upon the legal theories at the heart of his claims, and attaching more relevant evidentiary documents.

The Magistrate granted summary judgment nonetheless, and the Sixth Circuit affirmed. That decision of the Sixth Circuit conflicts with those of this Court as well as other circuits which have held that individual defendants do not possess qualified immunity where the plaintiff has pled factual allegations detailing violations of clearly established law. *See Sledd v. Lindsay*, 102 F.3d 282 (7th Cir. 1996); *Arnold v. Board of Education of Escambia County*, 880 F.2d 305 (11th Cir. 1989).

Petitioner urges this Honorable Court to grant certiorari in this case and resolve the issue of whether plaintiffs in civil rights cases are to be held to a heightened pleading standard as to individual defendants claiming qualified immunity. Petitioner urges such action so that individuals who allege civil rights violations will have a clear direction as to the manner in which they are to plead such allegations. Confusion as to threshold pleading standards may lead to many more cases where, as in the instant case, plaintiffs must endure years of procedural wrangling in order to merely proceed to discovery. Plaintiffs seeking to protect their most fundamental rights should not be made to grope around in the dark, searching for some amorphous "higher" standard, striving to present more, until the court is satisfied. This is particularly true if the court exhibits and abhorrence to civil rights claims by its unilateral and arbitrary conduct.

Petitioner urges that plaintiffs should not be saddled with a greater pleading burden than that required by Rule 8 of the Federal Rules of Civil Procedure. Proving violations of the civil rights statutes is in itself often exceedingly difficult, especially given the conspiratorial nature of such allegations. Factual accounts of individual defendants alleged violative actions, and inferences reasonable therefrom, like those pled by Petitioner in the case at bar, meet the Rule 8 requirements, and should be held sufficient to plead a violation of civil rights.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing have been served upon Leo F. Krebs, Esq., Attorney for Lawrence, Suite 400, National City Center, 6 North Main Street, Dayton, Ohio 45402; Edward J. Dowd, Esq., Attorney for Clark County, Ohio, and Gene Kelly, 205 East First Street, Dayton, OH 45402; John R. Butz, Esq., Attorney for Evans, Marcum, Menda, and Kerr, 125 East McCreight Avenue, Springfield, OH 45504; and Robin N. DeBell, Esq., Attorney for City of Springfield, 76 East High Street, Springfield, OH 45502; by regular U.S. mail this 25 day of September, 1997.

Dwight D. Brannon

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI

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NOT FOR PUBLICATION
No. 95-3358

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

March 13, 1997 FILED

STEPHEN MICHAEL RIDDER	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	) ON APPEAL FROM
CITY OF SPRINGFIELD	) THE UNITED
CLARK COUNTY,	) STATES DISTRICT
GENE A. KELLY,	) COURT FOR THE
ROGER EVANS,	) SOUTHERN
ROBERT MARCUM,	) DISTRICT OF
RONALD MENDAH,	) OHIO
ROBERT KERR,	)
WALTER J. LAWRENCE,	)
	) OPINION
Defendants-Appellees.	)

BEFORE: SUHRHEINRICH and MOORE, Circuit Judges; McKINLEY, District Judge*

* The Honorable Joseph H. McKinley, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

OPINION BY: KAREN NELSON MOORE

OPINION:OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant Stephen M. Ridder appeals the magistrate judge's entry of summary judgment for all defendants in this *42 U.S.C. §1983* action. For the reasons that follow, we affirm.[1]

I.

From January 1986 through July 1988, a series of rapes occurred in and around Springfield, Ohio. In July 1988, Stephen Ridder's hand was nearly severed in an industrial accident. While physicians reattached his hand, a hospital employee identified Ridder's voice as that of her attacker. Police began investigating Ridder. He could be placed in the general area for several of the incidents and five of eight victims identified him in a lineup. Pursuant to a fourteen-count indictment, the Springfield Police Department arrested Ridder on September 8, 1988. From then until January 4, 1989, Ridder was detained in the Clark County Jail.

As of the date he was arrested, the surgical incisions on Ridder's hand had healed and there was no drainage or infection. Nonetheless, he was going to physical therapy three times a week at Miami Valley Hospital, a fact noted on Ridder's detention screening form. On September 14, 1988,

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[1] This panel also addresses in a published opinion, No. 95-4220. Ridder's appeal of sanctions imposed after judgment by the magistrate judge pursuant to FED. R. CIV. P. 11 and 28 U.S.C. § 1927.

Ridder was examined by Dr. Walter R. Lawrence. It is disputed whether Ridder verbally told Dr. Lawrence about his therapy, but, in any event, Dr. Lawrence so no need for physical therapy. From mid-September through mid-October, Ridder did not attend any physical therapy sessions. In mid-October, Ridder obtained a letter from his treating physician addressing Ridder's need for therapy and follow-up surgery. Subsequent to the letter and corresponding court order, Ridder was transported to all scheduled surgical procedures and therapy sessions and was provided pain medication drugs.

On January 4, 1989, DNA tests exonerated Ridder. He was released from jail that day, and all charges against him were later dropped.

On January 4, 1990, Ridder filed a complaint against the City of Springfield, Clark County, Prosecutor Stephen A. Schumaker,[2] Clark County Sheriff Gene A. Kelly, Springfield Chief of Police Roger Evans, Sergeant Robert Marcum, Detectives Ronald Mendah [sic] and Robert Kerr, and Dr. Walter Lawrence alleging several causes of action pursuant to *42 U.S.C. § 1983* (deliberate indifference to serious medical needs, denial of due process, and subjection to cruel and unusual punishment), *42 U.S.C. § 1985* and state law (medical malpractice, conspiracy, and defamation). The assigned magistrate judge, Michael R. Merz, noted several pleading deficiencies and gave Ridder the opportunity to amend the complaint. The magistrate judge subsequently dismissed most claims in the amended

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[2] Ridder voluntarily dismissed the appeal as to Schumaker on May 5, 1995.

complaint as failing to state a claim upon which relief could be granted or as barred by qualified immunity. Ridder obtained leave and filed a second amended complaint. For this complaint, the magistrate judge granted a defense motion for a more definite statement, noting that several earlier pleading deficiencies remained. Ridder sought leave to file a third amended complaint and filed it on August 17, 1993. The magistrate judge found that complaint sufficient to proceed to discovery.

The scheduling order, dated February 15, 1994, specified that Ridder was to furnish expert reports to opposing counsel and the court by May 15, 1994. The magistrate judge expressly reminded counsel about the recent amendments to the Federal Rules of Civil Procedure, and directed that the expert reports "shall comply with Fed. R. Civ. P. 26(a)(2) (as amended December 1, 1993)." Scheduling Order, P 5 n.2; J.A. at 668.

On May 16, 1994, Ridder purported to comply with the required expert report disclosure, stating that for his fourteen-plus expert witnesses ("each defendant" was listed as an expert for the plaintiff), some reports had already been furnished while others would be forthcoming. The magistrate judge found that Ridder's disclosure failed to comply with Rule 26(a)(2) with respect to every witness. As no expert reports had yet been filed, the magistrate judge ordered Ridder to furnish copies of the supposedly completed reports and warned that non-conforming reports would be stricken and the witnesses not permitted to testify. At that time the magistrate judge struck six names from Ridder's expert list for which no reports had been actually or supposedly filed. Ridder then filed reports as to the eight remaining experts. Again, the magistrate judge determined

that the reports did not comply with Rule 26(a)(2) and consequently struck those experts. The effect was to bar the testimony of all Ridder's non-defendant experts.

On July 8, 1994, Ridder requested an additional thirty days to comply with Rule 26(a)(2). The magistrate judge denied the request without prejudice to renewal if Ridder made an actual showing of excusable neglect and attached complying expert reports. The issue of expert testimony then lay dormant for over six and a half months, while the discovery completion date passed. On January 23, 1995, Ridder renewed his effort to allow his experts to testify. The magistrate judge, however, disapproved of the delay and denied Ridder's renewed motion. The magistrate judge found that ignorance of amendments to the Federal Rules of Civil Procedure, especially after repeated reminders, did not amount to excusable neglect, and that Ridder's counsel had been given ample time to come into compliance. When Ridder finally resurrected the expert testimony issue, none of Ridder's proposed expert witnesses had been deposed, discovery had been completed, defendants had filed their summary judgment motions, and the trial date was only forty-two days away.

In December 1994, all defendants filed summary judgment motions. The magistrate judge struck some of Ridder's evidence in opposition of summary judgment, namely the unsworn letters of two physicians and inadmissible opinion testimony of Ridder. On February 28, 1995, the magistrate judge granted summary judgment in full to all defendants. Ridder timely appealed.

II

A

Ridder alleges several errors in the magistrate judge's handling of this protracted litigation.[3] First, Ridder asserts that the magistrate judge erred by dismissing claims against the individual police officers, the Chief of Police, and the Sheriff pursuant to the doctrine of qualified immunity.[4] The application of qualified immunity to a particular defendant is a question of law; our review is de novo. *Long v. Norris, 929 F.2d 1111, 1114* (6th Cir.), cert denied sub nom. *Jones v. Long, 502 U.S. 863, 116 L.Ed. 2d 148, 112 S. Ct. 187 (1991).* The ultimate burden of proof is on Ridder to show that defendants are not entitled to qualified immunity. See *Rich v. City of Mayfield Heights, 955 F.2d 1092, 1095 (6th Cir., 1992).* "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action...assessed in light of the legal rules that were 'clearly established' at the

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[3] Some defendants assert that Ridder failed to preserve his appeal properly as to orders of the magistrate judge other than the one dated February 28, 1995, due to Ridder's failure to list other orders in his notice of appeal. This argument is not well-taken. Ridder expressly appeals from the "judgment." See Notice of Appeal; J.A. at 406. Such language is construed generally to represent the ultimate resolution of the case. Thus, Ridder preserved appellate review as to all non-moot orders rendered by the magistrate judge previously in the litigation.

[4] The section of Ridder's appellate brief discussing qualified immunity is entirely based on the magistrate judge's order dated March 4, 1992 - an order that never took final effect. Subsequent to this order, Ridder obtained leave and filed a second amended complaint. Counsel is admonished to be mindful of which orders in the course of litigation become final and which are later superseded.

time it was taken." *Anderson v. Creighton, 483 U.S. 635, 639, 97 L.Ed. 2d 396, 102 S. Ct. 2727 (1982)).* Ridder makes vague allegations that police officers failed to investigate fully the possibility that Ridder might not have been involved in the rapes (although they did question Ridder and make [sic] some follow-up calls), and that they withheld from a search warrant affidavit inconsistent information given by the rape victims. Ridder fails to demonstrate what clearly established law created a duty for a police officer to conduct an alibi investigation in a particular manner, or how the claimed affidavit omissions would have negated the search warrant's probable cause. Based upon the proffered evidence, it cannot be said that the officers' conduct in procuring the warrant and partially investigating Ridder's alibis violated clearly established constitutional rights.

Ridder is also unable to sustain his claims against the Sheriff and Chief of Police. The record provides no basis to conclude that either supervisor was personally involved in Ridder's case, or that either supervisor encouraged or knowingly acquiesced in a constitutional deprivation. Thus, the magistrate judge properly dismissed the claims against the Sheriff, the Chief of Police, and the individual officers on the basis of their qualified immunity from suit.

B

The magistrate judge was also correct in granting summary judgment as to all other claims and defendants.[5]

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[5] As Ridder's appellate brief makes no mention of summary judgment as to Clark County, we conclude that Ridder has waived appellate review of this issue.

We review a district court's granting of summary judgment de novo, viewing all facts and inferences in a light most favorable to the nonmoving party. *Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 965 (6th Cir. 1991).* "The nonmoving party cannot rest on its pleadings but must present some 'specific facts showing that there is a genuine issue for trial.'" Id. (quoting *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 91 L.Ed. 2d 265, 106 S.Ct. 2548(1986)).*

As to the City of Springfield, a municipality will be liable under § 1983 only if a person was deprived of constitutional rights pursuant to a custom, usage, or policy of that entity. See *Monell v. Department of Social Servs., 436 U.S. 658, 690-91, 56 L.Ed. 2d 611, 98 S. Ct. 2018 (1978).* Ridder alleges that Springfield had a policy of consistently procuring defective search warrants. Yet, Ridder puts forth no evidence of a written policy or a decision of the person with ultimate authority to establish municipal policy. Nor does Ridder present affidavits or other evidence of other persons similarly violated, which would tend to show a pattern or custom. Even after benefiting from full discovery, Ridder failed to evince a custom, usage, or policy of the City that deprived him of constitutional rights. Thus, Ridder's claim against the City of Springfield was properly dismissed.

As to Dr. Lawrence, Ridder's evidence in opposition to summary judgment is manifestly lacking. Undoubtedly, Ridder's counsel is aware that unsworn, and even unsigned, letters do not amount to admissible evidence. Ridder has thus failed to show facts giving rise to a genuine issue concerning Dr. Lawrence's deliberate indifference to serious medical needs or medical malpractice.

While this litigation was running its course, Rule 26 of the Federal Rules of Civil Procedure was amended, with the amended rule taking effect on December 1, 1993, and governing actions then pending insofar as just and practicable. See *146 F.R.D. 404*. Ridder argues that the application of amended Rule 26(a)(2)(B) to his case was unjust and unworkable, thereby prejudicing him to the extent that he was unable to utilize any expert testimony.[6] We hold otherwise. It was certainly feasible to apply the amended rule in this case, for discovery had not yet commenced when the new rule took effect. It was also just, considering that the magistrate judge alerted counsel twice to the changes in the rule and allowed Ridder two opportunities to comply. Because changes in the federal rules will be applied to pending cases to the fullest extent possible, we stress that Ridder's counsel had the responsibility to stay abreast of such changes, especially when all he had to do in this case was read the scheduling order.

Ridder also objects to the magistrate judge's application of Rule 26(a)(2)(B) to treating physicians. We find no error with the magistrate judge's order. The plain language of the order permits Ridder's treating physicians to testify without Rule 26(a)(2)(B) expert report disclosures "so long as they do not purport to testify beyond the scope of their own diagnosis and treatment." Decision and Order;

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[6] Rule 26(a)(2)(B), as amended, requires, with respect to a witness who is retained or specially employed to provide expert testimony, the disclosure of a report containing a statement of all opinions, data, exhibits, qualifications (including publications authored in the preceding ten years), compensation, and a listing of any other cases in which the witness has testified within the preceding four years.

J.A. at 383. Thus, nothing precluded Ridder from submitting, in opposition to summary judgment, a properly sworn affidavit by a treating physician detailing Ridder's treatment.

We review the magistrate judge's decision to invoke Rule 37 discovery sanctions for abuse of discretion. *Taylor v. Medtronics, 861 F.2d 980, 985 (6th Cir. 1988).* Among the factors to be considered are: (1) whether the adversary was prejudiced by the failure to cooperate in discovery; (2) whether the sanctioned party was warned; and (3) whether less drastic sanctions than dismissal were imposed or considered. *Id. at 986.* Here, the magistrate judge struck the expert testimony only after repeated failure to produce adequate expert reports. Ridder had been given ample warning that noncompliance with expert report disclosures would result in striking the testimony. Under the circumstances, had the magistrate judge granted Ridder's late request to renew the expert testimony issue after a six-and-a-half-month delay, the non-offending parties would likely be prejudiced. At that point, Ridder's experts had not been deposed, the trial date was six weeks away, and summary judgment motions had already been filed. We cannot hold that, by sanctioning a party who had repeatedly failed to comply with discovery provisions, the magistrate judge abused his discretion in the instant action.

C

Ridder raises other issues dealing with his ability to amend further the complaint, the alleged partiality of the magistrate judge, and what Ridder asserts to be a denial of substantial justice. We have considered those arguments and hold them to be without merit.

As to Ridder's argument that the magistrate judge erroneously held him to a heightened pleading requirement for his § 1983 claims against individual defendants, we direct counsel to *Veney v. Hogan, 70 F.3d 917, 919 (6th Cir. 1995)* (holding that a plaintiff bringing a § 1983 action against individual government officials must satisfy a heightened standard of pleading when the defense of qualified immunity is raised), which remains the law in this circuit. Moreover, we cannot discern how Ridder was prejudiced if such a pleading error occurred, as Ridder's third amended complaint enabled the case to progress beyond the pleadings.

III

We are unable to find fault with the magistrate judge's handling and disposition of Ridder's case. Quite the contrary, we believe that the magistrate judge gave Ridder every reasonable opportunity to litigate these claims. Ridder's counsel simply failed to follow through. We will not countenance holding the magistrate judge accountable for what were, in all respects, Ridder's counsel's shortcomings. The judgment of the magistrate judge is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STEPHEN M. RIDDER * CASE NO. C-3-90-003

Plaintiff

v.

CITY OF SPRINGFIELD,
et al.,

Defendants

ORDER OF REFERENCE - CIVIL CASE

Filed February 8, 1990

Pursuant to Western Division Rule 1, Subsections (c),(d),(g), and (h), and 28 U.S.C. § 636(b) and (c), Michael R. Merz, United States Magistrate, is hereby appointed to rule upon all nondispositive pretrial motions, to report to the Court his recommended disposition of all dispositive pretrial motions, to serve as Special Master for a non-jury trial where the parties consent thereto or where an exception condition exists, and to report to the Court his recommended decision in this action; to preside at a jury trial where the parties consent thereto; and to enter final judgment where the parties consent thereto.

The Magistrate is further appointed to hear all post-trial motions, including applications for attorney's fees, and to report to the Court his recommended decision.

IT IS SO ORDERED.

/s/_____

Herman J. Weber, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN MICHAEL RIDDER,

Plaintiff : Civil Action No. C-3-90-003

-vs- Judge Weber
Magistrate Merz

CITY OF SPRINGFIELD, OHIO, et al.

Defendants. :

SCHEDULING ORDER

Filed March 16, 1990

This case is before the Court for a scheduling order under Fed. R. Civ. P. 16 following a telephone conference held March 16, 1990. Counsel for all parties participated.

The parties have not yet unanimously consented to full magistrate jurisdiction, but all counsel have indicated an intention to recommend consent and all parties are expected to consent. Accordingly, the case is hereby set for trial to the Magistrate, sitting with a jury, for five days beginning March 11, 1991. In the event the Clerk's office advises the Court that there has not been unanimous consent, the case will be re-set for trial on Judge Weber's docket.

A joint proposed final pretrial order in the form attached hereto will be filed not later that 4:30 P.M. on February 1, 1991. The final pretrial conference will be held by telephone at 4:00 P.M. on March 4, 1991. The Court wishes to emphasize that the proposed final pretrial order must be jointly prepared; in the absence of such an order, no final pretrial conference will be conducted, the trial will be continued, and counsel will be subject to sanctions, including possible dismissal for failure to prosecute. The instructions in the form of final pretrial order have the force of court order.

The parties are ordered to complete discovery, including any depositions for presentation at trial in lieu of appearance, not later than January 4, 1991. Completion of discovery means that all discovery must be concluded, not merely requested. (For example, interrogatories must be propounded sufficiently far in advance of the cut-off that they can be answered and the parties approach the Court to resolve any differences about responses prior to the cut-off.) Parties who undertake to extend discovery by agreement beyond the cut-off date without Court approval do so at the risk that the Court may not permit its completion prior to trial.

Counsel shall keep the Court currently advised of the status of discovery in this case and bring promptly to the Court's attention any discovery disputes requiring Court resolution.

Not later than August 1, 1990, the parties shall disclose to one another and file with the Court a list of expected lay trial witnesses with their addresses and a brief

synopsis of their expected testimony. Not later than August 1, 1990, Plaintiff shall disclose to Defendants and file with the Court the identity and addresses of his intended expert trial witnesses and shall furnish Defendants with copies of said experts' reports. Not later than September 2, 1990, Defendants shall disclosure to Plaintiff and file with the Court the identity and addresses of their intended expert trial witnesses and shall furnish Plaintiff with copies of said experts' reports. The purpose of this witness list exchange is to permit timely completion of discovery. Supplementation of the list after filing shall be only upon motion and for good cause.

All motions by Defendants directed to the pleadings, including any motions raising defenses permitted to be raised prior to trial under Fed. R. Civ. P. 12, shall be filed not later than April 16, 1990. Plaintiff's memorandum contra shall be filed not later than May 16, 1990, and Defendants' reply memoranda shall be filed not later than May 30, 1990.

Defendants have pleaded the defense of qualified immunity to Plaintiff's claims under 42 U.S.C. § 1983. They have accordingly requested and are hereby granted a stay of discovery directed to them until the motions to dismiss are decided. This stay does not prevent Plaintiff from conducting discovery directed to third parties. If the Defendants believe they are entitled to a stay of discovery directed to third parties, they shall file a motion for protective order in that regard. Similarly, the stay does not prevent Plaintiff from serving on Defendants requests for admission, as to which Defendants may also seek a protective order without complying with the formalities of S.D. Ohio R. 4.3.3.

Defendants' motions for summary judgment herein shall be filed not later than January 18, 1991; Plaintiff shall respond not later than February 1, 1991, and Defendants may file reply memoranda through and including February 8, 1991.

Plaintiff has agreed to an independent medical and psychiatric or psychological examination without further formality under Fed. R. Civ. P. 35. Defendants shall arrange such examination(s) as promptly as possible after receipt of Plaintiff's expert medical reports.

/s/_____
Michael R. Merz
UNITED STATES MAGISTRATE

March 16, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN M. RIDDER,

Plaintiff, : Civil Action No. C-3-90-003

Magistrate Merz

vs.

CITY OF SPRINGFIELD,
et al.

Defendants :

DECISION AND ENTRY DEFERRING DECISIONS ON PENDING MOTIONS TO DISMISS AND PENDING ADDITIONAL PLEADING

Filed September 10, 1990

This case is before the Court upon motions of all Defendants to dismiss or for judgment on the pleadings (Doc. ##21, 22, & 24).

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) can be granted only if there is no state of facts provable under the allegations of the complaint upon which the plaintiff could recover. Conley v. Gibson, 355 U.S. 41 (1957). The same standard is applicable to a motion for judgment on the pleadings. Thus if the Court were to grant any of the pending motions, it would almost certainly be

with leave to amend granted to Plaintiff. At the same time, public official defendants are entitled to rulings on qualified and absolute immunity defenses before discovery is conducted. Mitchell v. Forsyth, 472 U.S. 511 (1985); Poe v. Haydon, 853 F. 2d 418 (6th Cir. 1988). In order to give the Defendants the rulings they are entitled to before discovery (whether for or against immunity) without depriving Plaintiff of his day in court if he is entitled to one, the Court must insist that the case be re-pleaded.

Because the qualified immunity defense is a question of law for the Court but heavily dependent upon the factual context in which claims arise, pleading in a civil rights case under 42 U.S.C. § 1983 cannot be as simple as in a personal injury case. The plaintiff must plead facts sufficient to show a violation of established law. Dominque v. Telb, 831 F. 2d 673 (6th Cir. 1987). When he has not done so initially, the Court must give him an opportunity to supplement in the face of a qualified immunity defense. Poe, supra. The question to be decided with respect to qualified immunity is whether a reasonable official in the defendant's position could have believed his conduct to be lawful, considering the state of the law when he acted and the specific facts relative to plaintiff which he confronted. Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); Guercio v. Brody, ____ F. 2d ____, Case No. 88-2013 (6th Cir. August 13, 1990). The rights allegedly violated must also be particularized. Poe, supra.

At the present time, the Complaint in this case is pleaded in sufficiently conclusory terms that the Court cannot properly adjudicate the pending motions. The particular difficulties with the Complaint will be outlined below.

Plaintiff has sued two political subdivisions under 42 U.S.C. § 1983, the City of Springfield, and Clark County, both by naming these entities as Defendants and suing some of their officials in their official capacities. Political subdivisions cannot be held liable on the basis of respondeat superior, but only on the basis of a policy decision by the body authorized to make decisions on behalf of the subdivision. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). As to who the decision maker must be, compared Pembaur v. Cincinnati, 475 U.S. 469, 105 S. Ct. 3475, 87 L. Ed. 2d 611 (1985), with City of St. Louis v. Praprotnik; and see Molton v. City of Cleveland, 839 F. 2d 240 (6th Cir. 1988).

Confronted with this body of doctrine in the motions to dismiss, Plaintiff insists he has adequately alleged involvement of two entities. All that is pleaded, however, is that Defendants generally acted under the authority of "statute, ordinance, custom and usage" (¶12). That language does not sufficiently plead what policy or policies of which subdivision Defendant harmed Plaintiff on which occasions. Simply to say that Dr. Lawrence works under the authority of the Sheriff and the County Commissioners in fact pleads nothing more than respondeat superior.

The same problems occur with respect to Chief of Police Evans and Sheriff Kelly. They cannot be held liable under § 1983 under the doctrine of respondeat superior; they can be liable only if they had some personal participation in the deprivations of rights alleged, by participating, ordering, condoning, etc. Yet there are no specific allegations against them as to what they did to Plaintiff and when.

With respect to Dr. Lawrence and the three Springfield police officers, there is also a lack of specificity. For example, in ¶22, the Plaintiff alleges that "the Defendants" caused a search warrant to be issued without probable cause. Does that include Dr. Lawrence? Sheriff Kelly?[1] The Court cannot adjudicate the qualified immunity defenses of these Defendants without knowing what rights on what occasions in what factual contexts are alleged.

The Court also notes that John or Jane Does are named as Defendants but no allegations are made against them in the Complaint.

In addition, the pleading of federal and pendent state claims is completely intermingled. This makes is impossible to tell whether, for example, the Plaintiff is attempting to plead both malpractice and an Eighth Amendment violation against Dr. Lawrence. It also makes analysis of the conspiracy claim impossible.

With this hopefully useful guidance, it is hereby ordered that Plaintiff tender to the Court an amended complaint which corrects the foregoing deficiencies not later than September 24, 1990. In particular, the acts of individual Defendants are to be separated and alleged with specificity and the pendent and federal claims are to be separated.

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[1] The complaint says at ¶22 that a copy of the search warrant is attached, but in fact an arrest warrant is attached.

/s/_____
Michael R. Merz
UNITED STATES MAGISTRATE

September 10, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN M. RIDDER,

Plaintiff : Civil Action No. C-3-90-003

-vs- Magistrate Michael Merz

CITY OF SPRINGFIELD, OHIO, et al.,

Defendants. :

SCHEDULING ORDER

Filed November 21, 1990

This case is hereby set for oral argument on the pending motions on December 11, 1990, at 9:00 a.m. in Courtroom No. 2 at 200 West Second Street, Dayton, Ohio 45402.

In preparation for the hearing, Plaintiff shall file with the Court, not later than December 4, 1990, a memorandum of law which sets forth at least the following information:

1. As to each of the thirteen causes of action in the First Amended Complaint, whether it is brought pursuant to state or federal law.

2. As to each cause of action purportedly brought under federal law, which federal law it arises under.

3. As to each cause of action, the asserted basis of this Court's subject matter jurisdiction.

4. As to each cause of action, precisely which Defendants are sought to be held liable on that cause of action.

5. As to each cause of action, the case authority upon which Plaintiff relies for the proposition that the acts of Defendant(s) alleged in that cause of action violate clearly established law.

Plaintiff may incorporate in said memorandum any additional authority upon which he relies in opposition to Defendants' pending motions to dismiss and/or for judgment on the pleadings.

At the hearing, Defendants will be expected to respond in detail to Plaintiff's memorandum. For purposes of case scheduling, the Court wishes to know from Defendants whether any of them who have raised a qualified immunity defense will wish to appeal an adverse ruling on that defense at this stage of the proceedings, should one be entered, or whether they will wish to proceed with discovery with the possibility of renewing the defense by motion for summary judgment at the close of discovery.

/s/_____
Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

November 20, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN M. RIDDER,

Plaintiff : Civil Action No. C-3-90-003

-vs- Magistrate Michael Merz

CITY OF SPRINGFIELD, OHIO, et al.,

Defendants. :

ORDER DENYING MOTION FOR LEAVE TO FILE AFFIDAVIT
Filed June 5, 1991

This case is before the Court upon Motion of Plaintiff for Leave to File Affidavit and Supplemental Pleadings in Support of Plaintiff (Doc. #80).

The attached proposed affidavit is that of Plaintiff's counsel, Mr. Brannon, authenticating the attached report of Dr. Joseph Paley. While Mr. Brannon's affidavit is adequate to establish the authenticity of Dr. Paley's report, the report itself is not admissible in the form submitted. See Fed. R. Civ. P. 56(e).

Accordingly, the motion is DENIED.

/s/_____
Michael R. Merz
UNITED STATES MAGISTRATE
JUDGE

June 5, 1991.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN M. RIDDER,

Plaintiff : Civil Action No. C-3-90-003

-vs- Magistrate Michael Merz

CITY OF SPRINGFIELD, OHIO, et al.,

Defendants. :

DECISION ON PENDING DISPOSITIVE MOTIONS

Filed March 4, 1992

This federal civil rights action with pendent state claims was brought by Plaintiff Stephen Michael Ridder as a result of his arrest, pre-trial incarceration, and prosecution for a number of rape and related charges in the fall of 1988. The case is before the Court upon a Motion to Dismiss under Fed. R. Civ. Proc. 12(b)(6) by Defendant Clark County Prosecutor Stephen A. Schumaker (Doc. #21); a Motion for Judgment on the Pleadings under Fed. R. Civ. Proc. 12(c) by Defendants Clark County, Ohio, its Sheriff, Gene Kelly, and its jail doctor, Walter Lawrence (Doc. #22); and a similar motion under Rule 12(c) by Defendants City of Springfield, Ohio, and its police officers Roger Evans, Robert Marcum, Ronald Menda, and Robert Kerr (Doc. #24).

After these motions had been made and briefed, the Court determined that the Complaint was insufficiently definite to permit the Court to make a ruling and ordered an amended complaint (Doc. #39) which the Plaintiff then filed (Doc. #42). After the parties had filed supplemental memoranda, the Court found that the Amended Complaint still lacked sufficient particularity and ordered Plaintiff to file a memorandum setting forth the following:

> 1. As to each of the thirteen causes of action in the First Amended Complaint, whether it is brought pursuant to state or federal law.
>
> 2. As to each cause of action purportedly brought under federal law, which federal law it arises under.
>
> 3. As to each cause of action, the asserted basis of this Court's subject matter jurisdiction.
>
> 4. As to each cause of action, precisely which Defendants are sought to be held liable on that cause of action.
>
> 5. As to each cause of action, the case authority upon which Plaintiff relies for the proposition that the acts of Defendant(s) alleged in that cause of action violation clearly established law.

(Doc. #58). In response, Plaintiff filed the Memorandum which appears at Doc. #62. In interpreting the Amended Complaint for purposes of the pending motions, the Court relies upon the interpretation given by Plaintiff in the Memorandum; to the extent necessary, the Amended Complaint is deemed further amended by the Memorandum.

The test for dismissal under Fed. R. Civ. P. 12(b)(6) is a stringent one:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conely v. Gibson, 355 U.S. 41, 45-46 (1957); *Neitzke v. Williams*, 490 U.S. 319 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Hishon v. King & Spalding*, 467 U.S. 69, (1984); *Nishiyama v. Dickson Cty.*, 814 F.2d 277 (6th Cir. 1987) (en banc); *Collins v. Nagle*, 892 F. 2d 489 (6th Cir. 1989). For purposes of the motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976); *Craighead v. E.F. Hutton & Co.*, 899 F. 2d 485 (6th Cir. 1990).

All of the individual Defendants have raised the defense of qualified immunity. A public official is entitled to qualified immunity for conduct in performing discretionary functions so long as that conduct does not violate clearly established statutory or constitutional rights of which a reasonable officer would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Whether Defendants are entitled to qualified immunity in this case is a question of law for the Court. *Dominque v. Telb*, 831 F. 2d 673 (6th Cir. 1987). Such a determination is to be made at the earliest possible point in the case, so as to protect public officials such as Defendants from the threat of liability or harassing litigation that may inhibit the discharge of their official duties. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2D 253 (1986); *Poe v. Haydon*, 853 F. 2d 418 (6th Cir.1988), *cert . denied*, 488 U.S. 1007 (1989).

The defense of qualified immunity is not available to a municipality or other public body. *Owen v. City of Independence, Missouri*, 445 U.S. 622 (1980).

Qualified immunity is an affirmative defense; but once a defendant has pleaded it, the plaintiff has the burden of pleading sufficient facts to overcome the defense and the Court must decide the sufficiency of those pleaded facts as a matter of law and prior to discovery. *Dominique*, 831 F. 2d at 676.

The subjective good or bad faith of the public official is no longer material to the qualified immunity defense. The Supreme Court in *Harlow* adopted a purely objective standard: did the conduct violate clearly established law of which a reasonable officer would have been aware? Thus Plaintiff's repeated allegations in his motion papers that Defendants acted in subjective bad faith are irrelevant.

The facts which a Plaintiff must plead to overcome the qualified immunity defense must be sufficiently detailed so that the Court can determine whether they violate clearly established law. The Supreme Court and the Sixth Circuit have counseled against construing the violated right in question too broadly as this prevents a proper application of the "clearly established law" test. The test is whether the law was clear with respect to the specific facts facing the public official when he or she acted. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Guercio v. Brody*, 911 F. 2d 1179 (6th Cir. 1990) *cert. denied*, 111 S. Ct. 1651 (1991).

Ordinarily "clearly established law" means binding precedent of the Supreme Court, the circuit court of appeals, the forum state supreme court, or the deciding court. *Ohio Civil Service Employees v. Seiter*, 858 F. 2d 1171 (6th Cir. 1988); *Robinson v. Bibb*, 840 F. 2d 349 (6th Cir. 1988). For other decisions to satisfy test, they must "point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Ohio Civil Service Commission*, 858 F. 2d at 1178.

To decide correctly a motion to dismiss on qualified immunity grounds, then, the Court must determine the appropriate intersection of the *Conley v. Gibson* and *Anderson v. Creighton* lines of authority. In this case, the Court has attempted to reconcile those cases by allowing the Plaintiff, indeed requiring him, to file an amended complaint and then requiring an additional specification of the rights allegedly violated and the law relied upon the "clearly establish" those rights as of the time of the conduct sued upon.

In addition to the defense of qualified immunity, Defendant Stephen Schumaker relies upon the defense of absolute immunity, asserting that all of the facts he is alleged to have done involving the Plaintiff were done in his capacity as Clark County Prosecutor.[1]

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[1] Defendant Schumaker originally raised only the absolute immunity defense, but has added the qualified immunity defense as the pending motions moved toward ripeness; both defenses in his behalf are now before the Court.

As the Plaintiff correctly argues, prosecutors are not immune from liability under 42 U.S.C. § 1983 for every act they do. Rather, in *Imbler v. Pachtman*, 4234 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), the Supreme Court adopted a functional test. Prosecutors are to be afforded absolute quasi-judicial immunity for "activities intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430. Some of the decisions which prosecutors must make and for which the Supreme Court found absolute immunity in *Imbler* include "questions of whether to present a case to the grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present." *Id.* at 431.

The Sixth Circuit has distinguished from these absolutely immune activities instances where a prosecutor acts as an investigator or administrator; in these instances the prosecutor is entitled only to qualified immunity. *Joseph v. Patterson*, 795 F. 2d 549 (6th Cir. 1986); *Grant v. Hollenbach*, 870 F. 2d 1135 (6th Cir. 1989).

The administrative category of activities is parallel to the qualified immunity of judges in their administrative capacities, *see Forrester v White*, 484 U.S. 219, 108 S. Ct. 538, 98 L Ed. 2d 555 (1988), performing such functions as hiring and firing. That category is not relevant here.

More difficult is the investigative area. The Sixth Circuit recognized in *Joseph* that there will be investigative

work done by a prosecutor during the course of preparing a case for trial which will be in his or her role as an advocate before the court and therefore absolutely immune. On the other hand, if a prosecutor participated in or supervised an unconstitutional police interrogation of a criminal suspect, he would not be absolutely immune for that activity. 795 F. 2d at 555.

Against this legal background, the Court discusses below each of Plaintiff's thirteen separately pleaded causes of action, all of which are against multiple Defendants and some of which contain more than one theory of recovery.

First Cause of Action

Plaintiff's first cause of action is brought under 42 U.S.C. § 1983 and § 1985 against Defendants City of Springfield, and Officers Evans, Marcum, Menda, and Kerr. It claims that the search warrant they obtained to compel Mr. Ridder to produce samples of blood, hair, and saliva and to appear in a line-up was obtained without probable cause, based on false information, and motivated by actual malice of the individual Defendants. In defending against the pending motions, Mr. Ridder has asserted that the information contained in the search warrant affidavit is false (Doc. #26); while the original Complaint does not make that allegation, the Amended Complaint alleges Defendants cause the search warrant to be issued "untruthfully."

To be actionable under 42 U.S.C. § 1985, a conspiracy must be based on some racial "or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Macko v.*

Bryon, 641 F. 2d 447 (6th Cir. 1981). Mr. Ridder has not pleaded any racial or class-based animus for any of the Defendants' actions toward him and his claim in his First Cause of Action under 42 U.S.C. § 1985 must be dismissed for failure to state a claim upon which relief can be granted.

A person has a clearly established right not to have a search warrant issued for the search of his person which is based on an affidavit which the affiant knows to be false or which the affiant knows does not establish probable cause. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Mr. Ridder asserts that this particular search warrant is deficient in both respects. In his Affidavit (attached to Doc. #78) he grounds his assertion that the search warrant affidavit is false upon facts which he claims he provided to the Defendants detectives **after** he was arrested, but he provides no basis for this Court to conclude that the Defendants knew the affidavit was false when they filed it in support of the warrant application.

With respect to whether the search warrant affidavit on its face is sufficiently lacking in probable cause as to create liability for searching in reliance on the warrant, liability exists "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable..." *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

Upon review of the search warrant affidavit, this Court concludes that an officer could have reasonably believed it showed sufficient probable cause for the search which was sought. First of all, it describes a number of

rapes with a number of similar characteristics in the mode of preparation and physical description of the rapist. Secondly, it describes information received from a confidential information which asserted that Mr. Ridder was the "north end rapist." The informant provided information about Ridder which the detectives were able to corroborate: that Ridder did in fact work for a lawn care company which had accounts which placed him in the Northern Estates area and that he was extremely strong. Furthermore, a "company official" confirmed the truck on which Ridder worked carried duct tape, the sort of tape used by the rapist on his victims.[2] Most importantly, three of the victims had made a tentative identification of Ridder from a photo spread. These facts, taken together, are more than sufficient to ground a reasonable belief that probable cause existed for the search warrant. Accordingly, Plaintiff's 42 U.S.C. § 1983 claim in his First Cause of Action must be dismissed as barred by qualified immunity.

As noted above, the defense of qualified immunity does not apply to the City of Springfield. However, the City cannot be held liable under 42 U.S.C. § 1983 on a theory of respondeat superior; to hold the City liable, Plaintiff must plead and prove that he was deprived of his constitutional rights pursuant to a custom, usage, or policy of the City. Monell v. Department of Social Services, 436 U.S. 658 (1978). Plaintiff appears to misunderstand this requirement, as he has asserted in several places (e.g. Doc. #26) that the

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[2] Mr. Ridder relies on the fact that later on in the investigation a company official, a person who had been a roommate of Ridder's, told police that the trucks did **not** carry duct tape. But this later-learned fact does not destroy the apparent corroboration of the informant's information at the time the warrant was sought.

behavior of Officers Marcum, Menda, and Kerr **violated** City policy in their conduct toward Plaintiff. The Supreme Court has held that the existence of a policy sufficient to support liability under 42 U.S.C. § 1983 cannot be inferred from a single incident. *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985).

In Paragraph 22 of the Amended Complaint, Plaintiff alleges that it was the custom of the Springfield Police Department to apply for search warrants on the basis of affidavits which omitted information willfully and deliberately, but it does not identify which information was omitted from this warrant which would have resulted in eliminating the probable cause shown on the face of the warrant.

Since the First Cause of Action fails to plead a claim against the City of Springfield upon which relief can be granted, it must be dismissed as to the City.

Second Cause of Action

Plaintiff's Second Cause of Action is asserted under 42 U.S.C. § 1983 against the same four Defendants as well as Prosecuting Attorney Schumaker and Clark County. The alleged violation of federal rights is that these Defendants caused an indictment to be "issued" unlawfully, untruthfully, with reckless indifference to law, and with actual malice, alleging that Plaintiff had been guilty of various state crimes. (Amended Complaint, Doc. #42, ¶ 28). This cause of action must be dismissed in its entirety for failure to state a claim upon which relief can be granted.

As to the two governmental entities, there are no allegations in the Second Cause of Action that the Defendants acted toward the Plaintiff pursuant to any custom or policy of either the City of Springfield or Clark County.[3] The Second Cause of Action must be dismissed as to Springfield and Clark County without prejudice for failure to state a claim upon which relief can be granted.

In his explanatory memorandum (Doc. #62), Plaintiff says that the factual allegations relative to this Cause of Action are the "filing" of an indictment without proper investigation. Of course, none of the individual police officers "filed" the indictment. Indictments are returned by grand juries to a judge of the Court of Common Pleas, signed by the prosecutor, and then filed with the Clerk of Courts. If Mr. Ridder is complaining of testimony given by any of the individual officers to the grand jury, the giving of any such testimony, even if perjurious (which is not alleged here) is absolutely immune. *Briscoe v. LaHue*, 460 U.S. 325, 103 S. C. 1108, 75 L. Ed. 2d 96 (1983). If Mr. Ridder is complaining about the presentation of this case to the grand jury without more investigation, he has failed to point to any governing case law decision which clearly establishes a duty of investigating police officers to conduct

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[3] Despite the Court's admonition to Plaintiff with respect to pleading separate claims separately (See Doc. #39), each and every "Cause of Action" in the amended Complaint begins with a paragraph which incorporates by reference all of the preceding paragraphs. In order to make any kind of intelligible analysis of the Amended Complaint for purposes of pending motions, the Court has had to treat this language as surplusage and/or as clarified by Doc. #62, Plaintiff's explanatory memorandum.

a certain quantum of investigation before presenting a matter to the grand jury.

When the actual facts of this case are considered, Plaintiff's own investigation establishes that after Plaintiff was taken into custody, he was placed in a line-up as to which his counsel participated in determining the composition and that five victims of rape in the counts eventually filed identified Mr. Ridder as the perpetrator. Clearly, based on these identifications, there was sufficient probable cause to submit the matter to the grand jury.

As to Defendant Schumaker, the Court finds that his decision to present this matter to the grand jury is protected by absolute immunity. Such a decision comes within the actual language of *Imbler*.

Accordingly, as to all individual Defendants except Mr. Schumaker, the Second Cause of Action must be dismissed with prejudice as barred by qualified immunity; as to Schumaker, it must be dismissed with prejudice as barred by absolute immunity.

Third Cause of Action

Plaintiff purports to bring the Third Cause of Action pursuant to 42 U.S.C. § 1983, the Fourth, Fifth, Eighth, and Fourteenth Amendments, Ohio Rule of Criminal Procedure 46, and Ohio Revised Code § 2937.22. There is no private right of action for violation of Ohio Revised Code § 2937.22 or Ohio R. Crim. Proc. 46, both of which relate to the setting of bond. 42 U.S.C. § 1983 provides the right of action for violation of constitutional rights; there is no

separate cause of action directly under the Constitution. *Thomas v. Shipka*, 818 F. 2d 496 (6th Cir. 1987); *vacated on other grounds*, 872 F. 2d 772 (6th Cir. 1989). Accordingly, the Court treats this Cause of Action as arising only under 42 U.S.C. § 1983.

The sole claim made here is that all Defendants other than Sheriff Kelly and Doctor Lawrence sought an unreasonably high bond.

No allegations are made to any relevant policy or custom of the City of Springfield or Clark County. Accordingly, the Third Cause of Action must be dismissed as to them for failure to state a claim upon which relief can be granted.

As to Defendant Schumaker, advocacy of a bond to a court in a criminal case is clearly a part of the adjudicatory process and he is entitled to absolute immunity for that conduct.

Plaintiff cites no law which clearly establishes that it is a violation of any federal right for a police officer to advocate a particular bond. Assuming for purposes of the present motion that all the individual police officer Defendants (Evans, Marcum, Menda, and Kerr) each appeared in court and advocated a high bond or that Evans explicitly approved the others' doing so, they are each entitled to qualified immunity for that conduct and the Third Cause of Action against them must be dismissed with prejudice as barred by qualified immunity.

Fourth Cause of Action

The Fourth Cause of Action purports to be brought under 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments to the Constitution against only Defendant Stephen Schumaker. It asserts that he created unnecessary publicity regarding Mr. Ridder's case for purposes of bolstering his re-election campaign and violated the Code of Professional Responsibility.

There is no cause of action under 42 U.S.C. § 1983 or the United States Constitution for violating the Code of Professional Responsibility. There is also no direct cause of action for violation of the Fifth or Fourteenth Amendments. *Thomas v. Shipka, supra.* To the extent the allegation is that Mr. Schumaker defamed Mr. Ridder, this also is not actionable under 42 U.S.C. § 1983. *Paul v. Davis*, 424 U.S. 693 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). To the extent that the claim is that Mr. Schumaker released true information to the public about Mr. Ridder thereby prejudicing his right to a fair trial, Mr. Schumaker is entitled to absolute immunity. *Joseph v. Patterson, supra.* Even if it were determined that absolute immunity was not applicable, Mr. Schumaker would be entitled to qualified immunity as the Plaintiff has pointed to no case law which clearly establishes that such an act violates a criminal defendant's constitutional rights. Finally, this act is *damnum absque injuria* as to any fair trial since Mr. Ridder was not tried, but released without trial and the charges were dismissed.

The Fourth Cause of Action must be dismissed with prejudice.

Fifth Cause of Action

Mr. Ridder's Fifth Cause of Action is brought under 42 U.S.C. § 1983, 1985, 1986, and 1988 against police officer Defendants, Marcum, Menda, Kelly, and Evans.[4] Mr. Ridder asserts that they subjected him to an improper line-up, attempted to get him to plead guilty, and continued to keep him incarcerated after they learned he was innocent.

As noted above with respect to the First Cause of Action, Plaintiff has alleged no class-based animus sufficient to support a claim under 42 U.S.C. § 1985 and that claim must therefore be dismissed without prejudice. § 1986 is dependent on § 1985; without the latter there can be no claim under the former. § 1988 provides for attorney fees in these cases and does not create a separate cause of action.

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[4] In the Amended Complaint, Fifth Cause of Action, Plaintiff names all Defendants "except Dr. Lawrence and the Clark County Defendants." The body of the Amended Complaint then makes allegations against Schumaker. However, in the explanatory memorandum Plaintiff "clarifies" that Marcum, Menda, Kerr, Kelly, and Evans are sued in the Fifth Cause of Action. The Court does not understand why Sheriff Kelly is mentioned in this Cause of Action. There is no other allegation in the Amended Complaint that he was responsible for the post-indictment investigation or indeed for performing any function post-indictment except custodial. Obviously, at that point, he was acting pursuant to a mittimus to hold Mr. Ridder unless bond was posted. While the Court is unaware of any case authority directly in point, the function of holding a prisoner in jail pursuant to a mittimus would seem to be entitled to quasi-judicial absolute immunity. A sheriff, after all, has no authority under the Constitution or the laws of Ohio to second guess a judicial officer who orders someone held in lieu of bond.

The allegation with respect to the line-up is conclusory: Plaintiff does not state what it was that was improper or unconstitutional about the line-up. Moreover, any claim of an improper line-up is dispelled by the factual material produced by Plaintiff's investigator, Mr. Emmons (Doc. #78) which demonstrates that the line-up was arranged by Mr. Schumaker in consultation with Mr. Ridder's lawyer.

At this pleading state, the remaining claims under 42 U.S.C. § 1983 in this Fifth Cause of Action remain viable. Plaintiff asserts that the police officer Defendants continued to attempt to coerce him, by his continued incarceration, to plead guilty after they knew he was innocent. Whether Plaintiff can produce evidence that this in fact happened is another question. And the Court notes that negligence is insufficient for this claim. *Daniels v. Willaims*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). But any police officer would know that it is unconstitutional to use continued incarceration and the threat of continued prosecution to attempt to obtain a guilty plea from someone who is **known** to be innocent.

Sixth Cause of Action

Plaintiff's Sixth Cause of Action is a pendent claim for malicious prosecution against Stephen Schumaker and Clark County. Since the federal claims against Mr. Schumaker are being dismissed as barred by immunity, the pendent claims must also be dismissed without prejudice for lack of subject matter jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

Seventh Cause of Action

Plaintiff's Seventh Cause of Action is brought pursuant to 42 U.S.C. § 1983, 1985, and 1986 against all Defendants except Dr. Lawrence. The §§ 1985 and 1986 claims must be dismissed for the same reasons as set forth above for the Fifth Cause of Action.

The 42 U.S.C. § 1983 claim is for false arrest and false imprisonment. The Court does not understand how this claim differs from the Fifth Cause of Action. In any event, none of the Defendants is liable for false arrest in that Plaintiff was arrested initially with probable cause to believe he had evidence of the rape offenses and then was continued in custody with probable cause to believe he had committed at least some of those offenses when he was identified by five of the victims in the line-up. Of course, once the grand jury had returned an indictment, there was a finding by that body of probable cause.

As to false imprisonment, this claim is good insofar as it is the same claim made in the Fifth Cause of Action: to the extent any individual Defendant **knew** that Plaintiff was innocent and thereafter continued to cause his incarceration, that individual Defendant should have known that such conduct violated the Constitution. Whether the factual development will support a claim that this happened is another matter not ripe for decision at this point.

To the extent that the Seventh Cause of Action purports to be against the City of Springfield and Clark County, it must be dismissed without prejudice for failure adequately to allege that the conduct of any responsible

individual Defendant was pursuant to an official policy or custom.

Eighth Cause of Action

The Eighth Cause of Action, which purports to be under 42 U.S.C. § 1983 for "abuse of process" must be dismissed for the same reasons as the false arrest claim in the Seventh Cause of Action.

Ninth Cause of Action

The Ninth Cause of Action, as explained in Plaintiff's explanatory memorandum, is a claim under 42 U.S.C. § 1983 and the Eighth and Fourteenth Amendments against Clark County, Dr. Lawrence, and Sheriff Kelly for deliberate indifference to a serious medical need.[5] This claim is not directly actionable under the Eighth or Fourteenth Amendment, but is actionable under 42 U.S.C. § 1983. *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). The claim against Clark County must be dismissed because it is not alleged that the denial of medical care was pursuant to a custom or policy of the County. However, the claim against sheriff Kelly is sufficiently pleaded because it is alleged he participated directly in the denial. *Jones v. Denton*, 527 F. Supp. 106 (S.C. Ohio 1981). Whether Plaintiff will be able to prove that allegation is of course not ripe for decision at this time. The motion for judgment on the pleadings on the Ninth

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[5] In the body of the Amended Complaint, Plaintiff names all of the Defendants responsible on this cause of action, but the explanatory memorandum makes it clear that only Clark County, Sheriff Kelly, and Dr. Lawrence are intended to be named.

Cause of Action must be granted as to Clark County and denied as to Sheriff Kelly and Dr. Lawrence.

Tenth Cause of Action

Plaintiff's Tenth Cause of Action is a pendent claim for medical malpractice arising out of the same facts as the Ninth Cause of Action and thus is appropriately before this Court under *United Mine Workers v. Gibbs*. The motion for judgment on the pleadings as to the Tenth Cause of Action is denied.

Eleventh Cause of Action

Plaintiff's Eleventh Cause of Action is a pendent claim for defamation against Defendants Schumaker, Evans, Marcum, Menda, and Kerr. This claim is apparently adequately pleaded under the state law and is appropriate pendent to the remaining federal claims. As to this Cause of Action, Defendants motions to dismiss or for judgment on the pleadings are denied.

Twelfth Cause of Action

The Twelfth Cause of Action is pleaded under 42 U.S.C. § 1983 against Defendants Evans, Marcum, Menda, and Kerr for false arrest, false imprisonment, abuse of process and malicious prosecution allegedly constituting intentional infliction of emotional distress. This purported claim states nothing in addition to other claims made in others [sic] causes of action on which the Court has already ruled. The Twelfth Cause of Action is stricken as duplicative.

Thirteenth Cause of Action

The Thirteenth Cause of Action is for conspiracy under 42 U.S.C. § 1983, 1985, and 1986. For reasons explained above, the Cause of Action does not state a claim upon which relief can be granted under §§ 1985 and 1986. As to 42 U.S.C. § 1983, the claim is purely conclusory and insufficient to state claim upon which relief can be granted. Conspiracy claims must be pled with some degree of specificity; vague and conclusory allegations unsupported by material facts will not be sufficient to state a claim under 42 U.S.C. § 1983. *Gutierrez v. Lynch*, 826 F. 2d 1534 (6th Cir. 1987) citing *Jaco v. Bloechle*, 739 F. 2d 239, 245 (6th Cir. 1984). The Thirteenth Cause of Action must be dismissed for failure to state a claim upon which relief can be granted.

Plaintiff's Motion for Summary Judgment

This case is also before the Court upon Plaintiff's Motion for Summary Judgment (Doc. #77). While Plaintiff has sufficiently pleaded some causes of action as set forth above, it is completely inappropriate to consider summary judgment for Plaintiff before Defendants have had an opportunity for discovery. The Court notes in passing that much of the factual information filed by Plaintiff's investigator, instead of supporting Plaintiff's claims, casts considerable doubt on them: e.g., they show Mr. Emmons' doubt that the alibis could be confirmed, they indicate that Plaintiff's criminal case counsel did not pursue the alibi defense since he believed the DNA testing would result in Plaintiff's exoneration, they indicate that Mr. Schumaker made very little of the accusations against Plaintiff in his re-election campaign (at least as his opponent in that campaign

recalled), they cast doubt on whether there was an unusual delay in receiving DNA results, and they suggest that the Plaintiff was released very promptly after the DNA results were received. These are obviously all matters which will require additional exploration in discovery, but they do not establish that there is no genuine issue of material fact.

Notice of Scheduling Conference

This case is hereby set for scheduling conference at 8:45 a.m. on Tuesday, March 17, 1992, to schedule discovery and other matters with respect to the remaining claims.

March 3, 1992.

/s/_____
Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN MICHAEL RIDDER:		
Plaintiff(s),	:	Case No. C-3-90-003
-vs-	:	Magistrate Judge Michael R. Merz
CITY OF SPRINGFIELD, OHIO, et al.,	:	
Defendant(s).	:	

ORDER

Filed March 19, 1992

This case came on for scheduling conference by telephone at 8:45 a.m. on Tuesday, March 17, 1992. Counsel for all parties participated by person or by telephone.

A number of claims in the Third Amended Complaint were dismissed without prejudice. Mr. Brannon, trial attorney for Plaintiff, believes that he is now in a position, consistent with the requirements of Fed. R. Civ. Proc. 11, to file a fourth amended complaint which will cure the deficiencies which led to the dismissals. Plaintiff is granted leave to file a fourth amended complaint not later than May 1, 1992. All Defendants shall plead in response to the fourth amended complaint not later than May 20, 1992.

This case is hereby set for an in-person scheduling conference at 9:00 a.m. on May 27, 1992.[1] At that time counsel must be prepared to enter into a **firm** schedule for completion of this case.

March 19, 1992. /s/_____

Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

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[1] May 26, 1992, was discussed during the March 17th conference, but Mr. Butz had a conflict. Mr. Butz has advised the Court by letter that May 27, 1992, is acceptable to all counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN MICHAEL RIDDER:		
Plaintiff(s),	:	Case No. C-3-90-003
-vs-	:	Magistrate Judge Michael R. Merz
CITY OF SPRINGFIELD, OHIO, et al.,	:	
Defendant(s).	:	

ORDER GRANTING MOTION FOR DEFINITE STATEMENT AND IMPOSING SANCTIONS

Filed June 10, 1992

This case is before the Court upon Motion by Defendants Sheriff Gene Kelly and Clark County, Ohio, for Definite Statement (Doc. #91). Upon comparison of the Motion with the Second Amended Complaint, the motion is evidently well taken and is hereby GRANTED. Plaintiff shall file a definite statement setting forth the particulars requested not later than June 22, 1992.

This Motion for Definite Statement is merely the latest in a long series of requests by the Court and the Defendants for Plaintiff to state clearly who he is suing and for what. More than two years have gone by in this case in the attempt to get the issues clearly pleaded. Most recently in

early March, 1992, the Court granted Plaintiff leave to file another amended complaint to attempt to correct the deficiencies which led the Court to grant the then-pending motions to dismiss. Plaintiff was given nearly sixty days to do so, as much time as he requested. The Plaintiff was given an additional two weeks time because of a computer failure at Plaintiff's counsel's office. And still the Court is faced with a pleading that is not explicit about who is being sued for what.

The Court, acting sua sponte, finds that the filing of the Second Amended Complaint in such a state as to require the Motion for More Definite Statement constitutes a multiplication of proceedings unreasonably and vexatiously, in violation of 28 U.S.C. § 1927, and that Plaintiff's counsel are liable thereunder for the excess costs, expenses, and attorneys' fees incurred by Clark County and Sheriff Kelly as a result of that conduct. They may file an application for award of such costs, expenses, and attorneys' fees.

June 10, 1992.

/s/_____

Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN MICHAEL RIDDER:		
Plaintiff(s),	:	Case No. C-3-90-003
-vs-	:	Magistrate Judge Michael R. Merz
CITY OF SPRINGFIELD, OHIO, et al.,	:	
Defendant(s).		

SCHEDULING ORDER

Filed May 27, 1992

This case came on for scheduling conference pursuant to Fed R. Civ. Proc. 16 by telephone at 8:45 a.m. on May 27, 1992. All parties of record participated by their trial attorneys of record.

Plaintiff's Second Amended Complaint shall be deemed served on all Defendants as of May 27, 1992. All Defendants' time to answer or otherwise respond under Fed. R. Civ. P. 12 is extended to and including July 1, 1992.

PERTINENT SETTINGS

1. Settlement demand by Plaintiff(s) on Defendant(s) June 1, 1992

2. Discovery plan due — September 15, 1992

3. Last date for filing motions directed to the pleading (including motions to dismiss under Fed. R. Civ. P. 12(b)(6) — July 1, 1992

4. Date to exchange and file lists of lay witnesses with synopsis of expected testimony — September 1, 1992

5. Dates to exchange lists and of expert witnesses and furnish copies of expert reports to opposing counsel and the Court

   Plaintiff — September 1, 1992

   Defendants — October 1, 1992

6. Discovery cut off — December 31, 1992

7. Last date to file dispositive motions not directed to the pleadings: (e.g. summary judgment motions) — January 15, 1993

   Memoranda contra due — January 29, 1993
   Reply Memoranda due — February 5, 1993

(These dates apply to any summary judgment motions filed on the last date allowed; dispositive motions filed earlier in the case shall be treated in accordance with S.D. Ohio l. R. 7.2)

8. Date to file joint proposed final pretrial order — March 18, 1993

9. Final pretrial conference by telephone at 4:30 p.m. — March 22, 1993

10. Trial to a jury for five days commencing at 9:00 a.m. — March 29, 1993

The joint proposed final pretrial order shall be in the form attached hereto. The Court wishes to emphasize that the proposed final pretrial order must be **jointly** prepared; in the absence of such a draft joint order, no final pretrial conference will be held, the trial will be continued, and counsel will be subject to sanctions, including dismissal for failure to prosecute. The instructions in the form of final pretrial order attached have the force of court order.

All discovery, including any depositions for presentation at trial in lieu of appearance, shall be completed, and not merely requested, by the discovery cut off date. Parties who undertake to extend discovery by agreement beyond the cut off date without Court approval do so at the risk the Court may not permit its completion prior to trial. Counsel shall keep the Court currently advised of the status of discovery in this case and promptly bring to the Court's attention any discovery disputes requiring court resolution.

The discovery plan ordered herein, if any, is that contemplated by Fed. R. Civ. Proc. 16 and 26(f). It must be prepared and filed jointly, identify the issues and subissues (legal and factual) for trial and discovery purposes, establish a plan and schedule for discovery (how and from whom discovery will be obtained, the discovery vehicle to be used, etc.), set limitations on discovery if any, and determine such other matters, including the allocation of discovery expenses, as are necessary for the proper

management of discovery in this action. A discovery plan may be altered or amended only by leave of court. Upon approval by the Court, the joint discovery plan becomes a scheduling order of this Court, and parties are subject to sanctions under Fed. R. Civ. Proc. 16(f) for failure to comply.

Plaintiff's counsel has agreed to the independent medical examination of Plaintiff without further formality under Fed. R. Civ. P. 35. Defendants shall arrange such examinations promptly as possible consistent with the receipt of Plaintiff's expert medical reports and any requested medical records. Any such expert reports presently in existence shall be furnished forthwith so that this portion of the discovery can proceed promptly.

Pending ruling by the Court on the qualified and absolute immunity defenses of various Defendants, all discovery herein, except for the independent medical examination of the Plaintiff, is stayed on authority of *Mitchell v. Forsyth* [citation omitted].

May 27, 1992.

/s/_____

Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

STEPHEN M. RIDDER,

Plaintiff(s), : Case No. C-3-90-003

-vs-

Magistrate Judge Michael R. Merz

CITY OF SPRINGFIELD, OHIO, et al.,

Defendant(s). :

ORDER GRANTING LEAVE TO FILE THIRD AMENDED COMPLAINT, SETTING SCHEDULE FOR RESPONDING TO THIRD AMENDED COMPLAINT, AND RULING ON PENDING MOTIONS

Filed August 17, 1993

This case is before the Court upon Plaintiff's Motions (Doc. ##103, 117) for Leave to File Proposed Third Amended Complaint. Various Defendants have opposed those Motions on grounds of prejudice and that the proposed Third Amended Complaint still does not cure problems found with the First Amended Complaint.

The general standard for considering a motion to amend under Fed. R. Civ. P. 15(a) was enunciated by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178, 93 S. Ct. 227, 9 L. Ed. 2d 222 (1962):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of any allowance of the amendment, futility of amendment, etc.
> -- the leave sought should, as the rules require, be "freely given."

371 U.S. at 182. Delay in moving to amend may not alone be the ground for denial without finding prejudice to the other party. *Janikowski v. Bendix*, 823 F. 2d 945 (6th Cir. 1987); *Moore v. City of Paducah*, 790 F. 2d 557 (6th Cir. 1986).

Defendants assert that they have been prejudiced by Plaintiff's long delay (over 3-1/2 years at this point) in getting the pleading in proper order. The Court finds that they may have been burdened by this delay, but there has been no showing of prejudice. Specifically, because Defendants have raised and have not yet had resolved their qualified and absolute immunity defenses, no discovery has taken place which might have to be repeated because of the amendment.

Accordingly, Plaintiff's Motions (Doc. ##103, 117) for Leave to Amend are GRANTED and the Third Amended Complaint shall be filed forthwith. Defendants shall move, answer, or otherwise plead in response thereto not later than September 1, 1993.

Plaintiff is cautioned, however, that because the Court believes it has been extremely lenient with respect to permitting repleading in this matter; any further requests for amendment will be closely scrutinized.

Based on the filing of the Third Amended Complaint, all motions and pleadings of Defendants directed toward the Second Amended Complaint are MOOT. That includes The City of Springfield's Motion for Judgment on the Pleadings (Doc #104), Defendant Schumaker's Motion to Dismiss or for Judgment on the Pleadings (Doc. #105), and the Motion for Judgment on the Pleadings of Defendants Kerr, Evans, Marcum and Mendah (Doc. #93).

The Motion (Doc #117-3) of Plaintiff for an order overruling all Defendants' motions to date is DENIED. The Motions of Defendants Kelly (Doc. #83) and Schumaker (Doc. #84) to clarify the Court's Decision of March 4, 1992, are likewise DENIED AS MOOT in that none of the decisions announced therein became final judgments under Fed. R. Civ. P. 54. Plaintiff's Motion (Doc. #117-2) for Reconsideration of the Court' Decision of March 4, 1992, is also DENIED AS MOOT, given the permission to file the Third Amended Complaint. Plaintiff's Motion (Doc. #102-1) for Extension of Time to July 7, 1992, to respond to all Defendants' Motions is likewise MOOT in that Plaintiff has in fact been extended that time.

Plaintiff's Motion (Doc. #139) to Set Trail Date, Discovery Order, and Other Appropriate Pretrial Procedures is DENIED as premature. Plaintiff may well believe that filing the Third Amended Complaint disposes of all previous objections Defendants have had to lack of specificity or their respective defenses of absolute and qualified immunity, but Defendants are as entitled to raise those defenses by motion prior to discovery now as they were with respect to the Complaint, the Amended Complaint, and the Second Amended Complaint. Setting of a pretrial conference will await Defendants' responses to the Third Amended Complaint. Given the prolixity of the pleadings to date, both the Defendants and the Plaintiff are FORBIDDEN to brief any issues on motions to dismiss or for judgment on the pleadings with respect to the Third Amended Complaint by incorporating any prior matters by reference.

Finally, all pending motions for sanctions (Doc. ##96, 107, 110) are DENIED without prejudice to their renewal, provided that any renewed motions comment on the applicability of *Leatherman v Tarrant County Narcotics Intelligence and Coordination Unit*, _____ U.S. _____, 61 LW 4205 (March 3, 1993)(copy attached to Doc. #139).

August 16, 1993

/s/
Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN MICHAEL RIDDER:		
Plaintiff(s),	:	Case No. C-3-90-003
-vs-	:	Magistrate Judge Michael R. Merz
CITY OF SPRINGFIELD, OHIO, et al.,	:	
Defendant(s).	:	

ORDER DENYING DEFENDANT LAWRENCE'S MOTION FOR JUDGMENT ON THE PLEADINGS

Filed October 18, 1993.

This case is before the Court upon Defendant Walter Lawrence, M.D., for judgment on the pleadings (Doc. #153), pursuant to Fed R. Civ. P. 12(c).

Since the pleadings are complete as between Plaintiff and this Defendant, the motion is timely. For purposes of a motion for judgment on the pleadings, all well-pleaded allegations of the complaint are to be taken as true and the same standard is applied to deciding the motion as is applied to a motion to dismiss for failure to state a claim for relief under Fed R. Civ. P. 12(b)(6). 2A MOORE'S FEDERAL PRACTICE ¶12.15.

The test for dismissal under Fed R. Civ. P. 12(b)(6) is, of course, a stringent one:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 80 (1957); *Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Nishiyama v. Dickson Cty.*, 814 F. 2d 277 (6th Cir. 1987) (en banc); *Collins v. Nagle*, 892 F. 2d 489 (6th Cir. 1989). For purpose of the motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976); *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485 (6th Cir. 1990).

Plaintiff's claims against Dr. Lawrence are set forth in the Tenth Cause of Action in the Third Amended Compliant (Doc. #143) at ¶¶105-128. Intentional denial or indifference to medical care for the serious medical needs of an inmate is cruel and unusual punishment which is cognizable under 42 U.S.C. § 1983. *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). To be successful, an Eighth Amendment medical claim must contain both an objective component, that the medical needs were sufficiently serious, *citing Rhodes v. Chapman*, 452 U.S. 337 (1981); *McKinney v. Anderson*, 959 F. 2d 853, 854 (9th Cir.), *cert. granted*, 120 L. Ed. 2d 896 (1992); *Steading v. Thompson*, 941 F. 2d 498, 500 (7th Cir. 1991),

cert denied, 117 L. Ed. 2d 445 (1992), and a subjective component, that the prison officials were deliberately indifferent to the prisoners' needs, citing *Wilson v. Seiter*, 115 L. Ed. 2d 271 (1991); *McKinney*, 959 F. 2d at 854, and *Steading*, 941 F. 2d at 500. *Hunt v. Reynolds*, 974, F.2d 734 (6th Cir., 1992).

Despite its prolixity, the Tenth Cause of Action never alleges an Eighth Amendment claim against Dr. Lawrence in the terms of the governing case law, to wit, that he acted with deliberate indifference to a serious medical need. Nevertheless, it does allege that a serious medical need existed for continued surgeries and physical therapy for a pre-existing injury, that Dr. Lawrence was made aware of these needs directly by the prior treating physician, Dr. Barre, and that Dr. Lawrence was deliberately indifferent to these needs, telling Plaintiff they would be cared for when he got to prison.

The Court concludes that if Plaintiff can prove the facts set forth in the Tenth Cause of Action, he can recover against Dr. Lawrence on his Eighth Amendment claim and thus the claim is adequately pleaded.

Dr. Lawrence also asserts he is entitled to qualified immunity regarding his treatment of Mr. Ridder and that Plaintiff has not pled sufficient facts to overcome the qualified immunity defense.

Government officials performing discretionary functions are afforded a qualified immunity under 42 U.S.C. § 1983 as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v.*

Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2735, 73 L. Ed. 2d 395 (1982). The question is not the subjective good or bad faith of the public official, but the "objective legal reasonableness" of his or her action in light of clearly established law at the time the official acted. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). In order for the violated right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand what he or she is doing violates that right; in light of pre-existing law, the unlawfulness of the official's action must be apparent. *Andeson v. Creighton*, 483 U.S. at 640. The test is whether the law was clear in relation to the specific facts confronting the public official when he acted; the constitutional right must not be characterized too broadly without considering the specific facts of the case. *Guercio v. Brody*, 911 F. 2d 1179 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1651 (1991). If officers of reasonable competence could disagree on an issue, immunity should be recognized. *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Gossman v. Allen*, 950 F. 2d 338, 341 (6th Cir. 1991).

Qualified immunity is an affirmative defense. To establish that defense, the officials bear the burden of presenting facts which, if true, would establish that they were acting within the scope of their discretionary authority. Once they have done this, the burden shifts to the plaintiff to establish that defendant has violated a right so clearly established that any official in his position would have clearly understood he was under a duty to refrain from such conduct. *Wegener v. Covington*, 962 F. 2d 1209 (6th Cir. 1991); *Dominique v Telb*, 831 F. 2d 673 (6th Cir. 1987); *Ohio Civil Service Employees v. Seiter*, 858 F. 2d 1171 (6th Cir. 1988).

With respect to the particularity of pleading required as to qualified immunity, Dr. Lawrence relies on *Dominque, supra,* for the proposition that a plaintiff must plead facts which take the case outside the doctrine of qualified immunity. Mr. Ridder responds by referring the Court to *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. ___, 113 S. Ct. ___, 122 L. Ed. 2d 517 (1993). In *Leatherman*, the Supreme Court expressly rejected a Fifth Circuit requirement for pleading with extra particularity claims against municipalities under 42 U.S.C. § 1983, holding that such particularity could not be read into Fed R. Civ. P. 8. However, in doing so the Supreme Court noted it was not considering "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." 122 L. Ed. 2d at 523. The Fifth Circuit had originally developed the heightened pleading requirement in qualified immunity cases. *See Elliott v Perez*, 751 F. 2d 1472 (1985), quoted at 122 L. Ed. 2d 524.

Plaintiff argues that *Leatherman* should be extended to qualified immunity cases, but this Court disagrees. One of the principal reasons given by the Supreme Court for not requiring heightened pleading in municipal liability cases is that municipalities are free from respondeat superior liability under § 1983, but not free from suit. 122 L. Ed. 2d at 523. However, the Supreme Court has repeatedly emphasized that the qualified immunity defense does confer freedom from suit, not just from liability. Because qualified immunity is an immunity from suit as well as from damages, a public official who pleads a qualified immunity defense is entitled to have that defense decided before the case proceeds even to discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct.

2806, 86 L. Ed. 2d 411 (1985); *Dominque, supra; Poe v. Haydon*, 852 F.2d 418 (6th Cir. 1988). Resolution of qualified immunity is a pure question of law for the Court. *Dominque*, 831 F. 2d at 677; *Garvie v. Jackson*, 845 F. 2d 647, 649 (6th Cir. 1988).

The Court concludes that *Leatherman* does not displace prior Sixth Circuit law with respect to resolution of the qualified immunity defense prior to discovery. Since all the Court has before it prior to discovery are the pleadings, supplemented by whatever affidavits may be appended to dismissal motions, it must be on the basis of such material that the Court resolves the qualified immunity defense, at least in the first instance. Plaintiffs generally are required to meet the qualified immunity defense on the basis of their pleadings and any other non-discovered information available to them.

On the present qualified immunity motion, all the Court has before it are the Third Amended Complaint, Dr. Lawrence's Motion, and Plaintiff's Memorandum in Opposition. None are supported by affidavits, but the Third Amended Complaint is verified, for whatever worth that may be. On the basis of these materials, it is clear that Dr. Lawrence is sued, at least in part, on the basis of his public employment and the duties he performs in that employment with respect to prisoners such as Mr. Ridder involve the exercise of discretion. Therefore he is prima facie within the class of persons entitled to claim qualified immunity. The question then is whether Plaintiff has alleged acts by Dr. Lawrence which violated Plaintiff's clearly established constitutional rights.

Ordinarily, "clearly established law" means binding precedent of the United States Supreme Court, the Sixth Circuit Court of Appeals, the Ohio Supreme Court or the deciding court itself. *Wegener v. Covington*, 962 F. 2d 1209 (6th Cir. 1991); *Garview v. Jackson*, 845 F. 2d 647, 649 (6th Cir. 1988); *Davis v. Holly*, 835 F. 2d 1175, 1180 (6th Cir. 1987); *Robinson v. Bibb*, 840 F. 2d 349, 352 (6th Cir. 1988). For other decisions to satisfy the test, they must "point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Ohio Civil Service Employees v. Seiter*, 858 F. 2d 1171 (6th Cir. 1988). For a constitutional right to be clearly established, the law must be clear in regard to the official's particular actions in the particular situation. *Long v. Norris*, 929 F. 2d 1111, 1114 (6th Cir.) , *cert. denied*, 112 S. Ct. 187 (1991). To determine whether a right is clearly established, a district court must look first to Supreme Court decisions, then to decisions of the Sixth Circuit, and only then to decisions of other circuits. *Daugherty v. Campbell*, 935 F. 2d 780, 784 (6th Cir. 1991), cert. denied, 112 S. Ct. 939 (1992). Plaintiff acknowledges this standard, but cites to *Lewandowski v. Fauver*, 531 F. Supp. 53 (D.N.J. 1981); *Sivard v. Pulaski County*, 959 F. 2d 662 (7th Cir. 1992); *Mandell v. Doe*, 888 F.2d 783 (11th Cir. 1989); *York v. City of Detroit, Michigan*, 438 Mich. 744, 475 N.W. 2d 346 (1991); *Goodman v. Wagner*, 553 F. Supp. 255 (D.C. Pa. 1982); *Barfield v. Brierton*, 883 F.2d 923 (11th Cir. 1989); *Dace v. Solem*, 858 F.2d 385 (8th Cir. 1988); and *Ellis v. Butler*, 890 F. 2d 1001 (8th Cir. 1989). None of these cases is from one of the courts whose

decisions create "clearly established law" for public officials in this judicial district *Hill v. Marshall*, 962 F. 2d 1209 (6th Cir. 1992), while from an appropriate court, was decided after the events in suit and thus could not have clearly established the law when Dr. Lawrence acted. A district court may look beyond its own precedent, the Supreme Court, and the Sixth Circuit only in extraordinary cases. *Ohio Civil Services Employees Ass'n v. Seiter*, 858 F. 2d 1171, 1177 (6th Cir. 1988).

The ultimate burden of proof is on the plaintiff to establish that a defendant is not entitled to qualified immunity. *Washington v. Newsom*, 977 F. 2d 991, 995, (6th Cir. 1992), *cert. denied*, 113 S. Ct 1848 (1993). The test is whether the law was clear in relation to the specific facts confronting the public official when he acted, *Guercio v. Brody*, 911 F. 2d 1179 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1651 (1991) following *Rakovich v. Wade*, 850 F. 2d 1180, 1209 (7th Cir. (en banc), *cert. denied*, 488 U.S. 968 (1988). The constitutional right must not be characterized too broadly without considering specific facts of case. *Guercio v. Brody, supra*. Thus it is not sufficient that the Supreme Court has generally established that a claim of deliberate indifference to serious medical needs states a claim for relief under the Eighth Amendment's Cruel and Unusual Punishment Clause. Rather the question must be whether the relevant case law establishes a constitutional duty this doctor was bound to obey, given the facts with which he was confronted.

The Court finds Plaintiff's citation of *Westlake v. Lucas*, 537 F. 2d 857 (6th Cir. 1976), to be dispositive. *Westlake* was decided while *Estelle v. Gamble* was pending

before the Supreme Court, but it is sufficient to establish the constitutional right for which Plaintiff contends. It involved a bleeding ulcer, a condition not immediately visible to jail officials, but from which plaintiff was suffering when admitted to jail. This is a different situation from the compound fracture in *Estelle*, but plaintiff's complaints were sufficient to put the jail authorities on notice to give treatment. In this case it is alleged that Plaintiff's treating physician himself told Dr. Lawrence of the need for therapy. In addition, the Receiving-Screening form at the jail, Ex. 14 to the Complaint, shows that Plaintiff reported his treating physician's name, the therapy need, and the seriousness of the injury.

The Court concludes Plaintiff has adequately pleaded facts to overcome Dr. Lawrence's defense of qualified immunity.

Dr. Lawrence also moves the Court to dismiss Mr. Ridder's Ohio medical malpractice claim for lack of subject matter jurisdiction, based on his request to dismiss the federal claim, relying on *United Mine Workers of America v. Gibbs*, 483 U.S. 715 (1966), which held that pendent jurisdiction claims must almost always be dismissed if the federal claims to which they are pendent are dismissed. In opposing the motions as to this portion, Plaintiff relies on *Province v. Cleveland Press Publishing Co.*, 787 F. 2d 1047 (6th Cir. 1986), and *Gaff v FDIC*, 814 F. 2d 311 (6th Cir. 1987).

Since the Court is retaining jurisdiction of the constitutional claim, these arguments are moot. However, the parties should be advised that the pendent jurisdiction

doctrine has been superseded by the statutory doctrine of supplemental jurisdiction, 28 U.S.C. § 1367. Under that doctrine, the Court would be entitled to retain jurisdiction over the medical malpractice claim even if the federal claim were dismissed.

Defendant Walter Lawrence's Motion for Judgment on the Pleadings is DENIED in its entirety.

October 18, 1993. /s/_____

Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DIVISION

STEPHEN M. RIDDER,

Plaintiff(s), : Case No. C-3-90-003

-vs- Magistrate Judge
Michael R. Merz

CITY OF SPRINGFIELD,
OHIO, et al.,

Defendant(s). :

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR EXTENSION OF TIME

Filed November 8, 1993

This case is before the Court upon Motion of Plaintiff Stephen Ridder for a second extension of time to file a memorandum in opposition to Defendant Schumaker's Motion for Judgment on the Pleadings dismissing the Third Amended Complaint (Doc. #159). The Motion was filed ex parte on the last day of the previously extended period, so that the Court is essentially presented with a *fait accompli*. The grounds cited for the extension are in the same words as the grounds for the last extension, which represented that November 5, 1993, would be sufficient time.

This case is now almost four years old. It is the only active case on teh (sic) undersigned's trial docket more than three years old. Counsel should be aware that the Congress of the United States, in the Civil Justice Reform Act of 1990, took a very dim view of cases being held on the docket more than three years. This Court has just approved a goal of eighteen months for completion of virtually all cases on the docket. When the Judicial Council of the Sixth Circuit looks at reports of old cases, they do not see counsel's name, they see mine!

The issues presented by this Motion have previously been briefed on several occasions and have been apparent on the face of the record since the case was filed. Accordingly, the time within which Plaintiff may file his memorandum contra is extended to and including November 9, 1993.

No further motions for extension of time will be entertained from Plaintiff unless the face of the motion shows that the request has been discussed with counsel for the Defendants and whether they agree or dissent from the extension.

s/s
Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

November 5, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN M. RIDDER,

Plaintiff(s), : Case No. C-3-90-003

-vs-

Magistrate Judge
Michael R. Merz

CITY OF SPRINGFIELD,
OHIO, et al.

Defendant(s). :

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT SCHUMAKER'S MOTION FOR JUDGMENT ON THE PLEADINGS

(Filed On January 24, 1994)

This case is before the Court on Defendant Stephen Schumaker's Motion to Dismiss or for judgment on the Pleadings (Doc. #152) directed to Plaintiff's Third Amended Complaint (Doc. #143). The Motion tests only the pleadings, since this case has not yet proceeded to discovery.

The test for dismissal under Fed. R. Civ. P. 12(b)(6) is, of course, a stringent one:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L. Ed. 2d 80 (1957); *Neitzke v. Willliams*, 490 U.S. 319, 109 S.Ct 1827, 104 L.Ed. 2d 338 (1989); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Nishiyama v. Dickson Cty.*, 814 F. 2d 277 (6th Cir. 1989). For purposes of the motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Westlake v. Lucas*, 537 F. 2d 857 (6th Cir. 1976); *Craighead v. E.F. Hutton & Co.*, 899 F. 2d 485 (6th Cir. 1990).

For purposes of a motion for judgment on the pleadings, all well-pleaded allegations of the complaint are to be taken as true and the same standard is applied to deciding the motion as is applied to a motion to dismiss for failure to state a claim for relief under Fed. R. Civ. P. 12(b)(6). 2A MOORE'S FEDERAL PRACTICE ¶12.15.

This case remained at the pleading stage for over four years, in part as the result of the somewhat indefinite standards of pleading particularity which have been applied by the various courts of appeals to cases brought under 42 U.S.C. §1983. The starting point for pleading analysis must be Fed. R. Civ. P. 8(a) which provides in pertinent part:

> A pleading which sets forth a claim for relief ... Shall contain (1) a short and plain statement of the grounds

> upon which the court's jurisdiction depends, ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment of the relief the pleader seeks.

While in most cases Rule 8(a) has been interpreted to require only a general statement of a party's claim, some courts had imposed a more stringent requirement in civil rights cases. See, e.g., *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985). Insofar as this rule was applied to pleading civil rights violations against municipalities, it was rejected last term by the Supreme Court in *Leatherman v Tarrant County Narcotics Intelligence &Coordination unit*, 507 U.S. ____, 113 S. Ct. 1160, 122 L. Ed. 517 (1993).

Plaintiff has asserted that *Leatherman* should be extended to §1983 cases against individuals, which therefore involve immunity defenses, but the Court disagrees. In *Leatherman* itself, the court expressly disclaimed any consideration of "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." 122 L. Ed. 2d 523. Furthermore, the Court did not suggest in *Leatherman* itself, the court expressly disclaimed any consideration of "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." 122 L. Ed. 2d at 523. Furthermore, the Court did not suggest in *Leatherman* it was overruling any of its immunity jurisprudence and reiterated that the

immunity defense provides immunity from suit, not just from liability. When the prior body of immunity jurisprudence is considered, this Court notes the Supreme Court itself has ruled that an official defendant is entitled to have his or her immunity defense adjudicated before he or she is subjected to discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L. Ed. 2d 411 (1985).

The Sixth Circuit has established a number of rules about pleading immunity defenses which implement this basic Supreme Court decision. Immunity must be pled by the defendant official, who must also plead sufficient facts which, if true, would establish he was acting within the scope of the discretionary authority. Once he has done so, the burden shifts to the plaintiff to establish that defendant has violated a right so clearly established that any official in his position would have clearly understood he was under a duty to refrain form such conduct. *Wegener v. Covington*, 962 F.2d 1209 (6th Cir.); *Dominique v. Telb*, 831 F.2d 673 (6th Cir. 1987); *Ohio Civil Service Employees v. Seiter*, 858 F. 2d 1171 (6th Cir. 1988). The ultimate burden of proof is on the plaintiff to establish that a defendant is not entitled to qualified immunity. *Washington v. Newsom*, 977 F. 2d 991, 995 (6th Cir.. 1992), *cert. denied*, 113 S. Ct. 1848 (1993). The test is whether the law was clear in relation to the specific facts confronting the public official when he acted, following *Guercio v. Brody*, 911 F.2d 1179 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1651 (1991), following *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. (en banc), *cert. denied*, 488 U.S. 968 (1988). The constitutional right must not be characterized too broadly without considering the specific facts of the case actually before the court. *Guercio v. Brody*, supra. For example, it

is well established that the Fourth Amendment makes it unconstitutional generally to search without a search warrant, but the myriad factual variations in the Fourth Amendment jurisprudence would make a claim that "police officer defendant Doe searched my car on x date without a search warrant completely insufficient to permit a court to adjudicate Officer Doe's qualified immunity defense.

The rationale for more particularized pleading in immunity defense cases is implicit in the foregoing authority: the pleading must serve an additional function in these cases, beyond what they serve in the usual federal case. In most cases, generalized pleading is adequate because the parties have the very broad discovery techniques of Rules 26 through 37 available to flesh out he pleading allegations. See *Conley v. Gibson*, 355 U.S. at 47-48. In immunity defense cases, the district court must decide those defenses "as a pure question of law" on the basis of the pleadings alone. See cases cited *infra* at p. 7.

Even with the need for particularized pleading, however, Plaintiff's Third Amended Complaint plainly violates Rule 8(a). It is 71 pages long, with almost as many pages of attachments. [1] Furthermore, it continues to suffer from many of the same problems identified in earlier complaints in this case. For example, every pleaded "Cause of Action" incorporates by reference all of the preceding paragraphs in the Complaint. For what purpose? Some

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[1] See *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964)(55 page complaint failed to comply with Rule 8.)

prior allegations may be part of subsequent claims, but surely not all. Furthermore, many of the paragraphs add words to the complaint without adding any information. For example, Par. 22 reads:

> The aforesaid conduct of all the defendants was done knowingly, intentionally, willfully, wantonly, grossly negligently, negligently, recklessly and/or with total indifference as to the lawful rights of the Plaintiff, and/or all the defendants acted in such a manner that was contrary to any reasonable person in their position would have acted because they knew, or should have known, that they were violating Plaintiff's clearly delineated constitutional and/or statutory rights.

This paragraph is incorporated by reference in every claim for relief. Does it give any Defendant fair notice of the level of *scantier* with which he is alleged to have acted? No! Rather, it does no more than display Plaintiff's counsel's awareness that there are a number of different levels of scienter which may be applicable to this case, but eliminates none of them except, I suppose, strict liability.

However, the Court's efforts with respect to prior complaints in this case have been totally unsuccessful in curing Plaintiff's pleading deficiencies.[2] All the parties to this case are entitled to a determination of the immunity defenses and to have this case proceed through discovery and trial. Accordingly, no further amendments of the

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[2] See Decision on Pending Dispositive Motions, March 4, 1992, p.8n.3, which makes precisely the same point about unthinking incorporation of all prior allegations by reference as is made here.

pleadings will be countenanced. Plaintiff has now had four opportunities over four years to plead his case; the case, and individual claims within it, must stand or fall on the present Third Amended Complaint.

Defendant Stephen Schumaker is, and was at all material times, the duly elected, qualified, and acting prosecuting attorney of Clark County, Ohio. Plaintiff purports to sue Mr. Schumaker "personally and in his capacity as the prosecuting attorney of Clark County, Ohio, and for his conduct outside of his office as Clark County Prosecutor while still representing himself under the color of law." (Doc. #143, caption) This is a fine example of Plaintiff's counsel's adding meaningless confusing and conclusory words which do not assist anyone - or the Court - in understanding or responding to his claims. The Court construes this as an action against Mr. Schumaker individually and in his official capacity known to the Court such as is attempted to be pleaded, and in any event the Plaintiff offers no explanation of what distinction he is trying to make.

With respect to claims made against him under 42 U.S.C. §1983 in his individual capacity, Mr. Schumaker is entitled to have this Court determine whether he is absolutely immune or immune. In contrast, the suit against Mr. Schumaker in his official capacity is essentially a suit against Clark County, Ohio; while Ohio counties are not *sui juris*, it is the Clark County treasury which must satisfy any judgment against Mr. Schumaker in his official capacity. *Brandon v. Holt*, 469 U.S. 464 (1985); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). The fact that a state

actor was acting within the scope of his or her official duties does not make an action against him an official capacity action, however; "the phrase " acting in their official capacities" is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Hafer v. Melo*, 502 U.S. ___, 112 S. Ct. 358, 116 L. Ed. 2d 301, 310 (1991). The immunity defenses do not appiy to official capacity actions. *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980); *Leatherman* , supra.

Plaintiff has argued strongly in his Memorandum in Opposition (Doc. # 161) against any absolute immunity for Defendant, but the Court must analyze Defendant Schumaker's position in terms of both absolute and qualified immunity. See, e.g., *Buckley, supra*, where prosecutors are left to their qualified immunity defense when their absolute immunity claim fails.

In general government officials performing discretionary functions are afforded a qualified immunity under 42 U.S.C. §1983 as long as their conduct " does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2735, 73 L.Ed. 2d 396 (1982). The question is not the subjective good or bad faith of the public official, but the "objective legal reasonableness" of his or her action in light of clearly established law at the time the official acted. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L.Ed 2d 523 (1987). In order for the violated right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right; in light of pre-existing

law, the unlawfulness of the official's action must be apparent. *Anderson v. Creighton*, 483 U.S. at 640. If officers of reasonable competence could disagree on an issue, immunity should be recognized. *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Gossman v. Allen*, 950 F. 2d338, 341 (6th Cir. 1991). A probable cause determination, even if wrong, is not actionable as long as it was a reasonable determination. Reasonableness is a question of law for the trial judge. *Hunter v. Bryant*, 112 S. Ct. 534 (1991).

Resolution of a qualified immunity defense is a pure question of law for the Court. *Dominique*, 831 F. 2d at 677; *Garvie v. Jackson*, 845 F. 2d 647, 649 (6th Cir. 1988). The trial judge is to apply the purely objective test of *Harlow v. Fitzgerald*, as a matter of law before discovery occurs. *Windsor v. The Tennessean*, 719 F.2d 155 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984).

The ultimate burden of proof is on the plaintiff to show that the defendants are not entitled to qualified immunity. *Wegener v. Covington*, 933 F. 2d 392 (6th Cir. 1991); *Washington v. Newsom*, 977 F.2d 991, 995 (6th Cir. 1992), *cert. denied*, __U.S. _____. 113 S. Ct. 1848 (1993). Before reaching the immunity question, a court must decide whether there has been a constitutional violation at all. *Siegert v. Gilley*, 500 U.S., 114 L. Ed. 2d 277 (1991); *Silver v. Franklin Twp.*, 966 F. 2d 1031 (6th Cir. 1992).

Ordinarily, "clearly established law" means binding precedent of United States Supreme Court, the Sixth Circuit Court of Appeals, the Ohio Supreme Court, or the deciding

court itself. *Wegener v. Covington*, 933 F. 2d 390 (6th Cir. 1991); *Garvie v. Jackson* , 845 F. 2d 647, 649 (6th Cir.. 1988); *Davis v. Holly*, 835 F. 2d 1175, 1180 (6th Cir. 1987); *Robinson v. Bibb*, 840 F. 2d 349, 352 (6th Cir.. 1988). For other decisions to satisfy the test, they must "point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171 (6th Cir.. 1988). For a constitutional right to be clearly established, the law must be clear in regard to the official's particular actions in the particular situation. *Long v. Norris*, 929 F. 2d 1111, 1114 (6th Cir..), *cert. denied*, ___U.S. _____, 112 S. Ct. 187 (1991). To determine whether a right is clearly established, a District court must look first to Supreme Court decisions, then to decisions of the Sixth Circuit, and only then to decisions of other circuits. *Daugherty v. Campbell*, 935 F. 2d 780, 784 (6th Cir.. 1991), *cert. denied*, _____U.S._____, 112 S. Ct. 939 (1992). A district court may look beyond its own precedent, the Supreme Court, and the Sixth Circuit only in extraordinary cases. *Ohio Civil Service Employees Ass'n. v. Seiter*, 858 F. 2d 1171, 1177 (6th Cir. 1988).

Acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protection of absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed. 2d 128 (1976); *Burns v. Reed*, 500 U.S. ____, 111 S. Ct. 1934,

114 L.Ed. 2d 547 (1991); *Buckley v. Fitzsimmons*, ____U.S.____, 113 S. Ct. 2606, advising police, or personnel matters. *Burns*. It does apply to presenting allegedly false or defamatory testimony or making false or defamatory statements in judicial proceedings. *Burns*. Absolute immunity applies to professional evaluation of evidence assembled by the police. *Buckley*. However, when a prosecutor performs the investigative functions ordinarily performed by a detective, he is only qualifiedly immune. *Buckley, citing Hampton v. Chicago*, 484 F. 2d 602, 608 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974). A prosecutor is not and should not consider himself an advocate before he has probable cause to have anyone arrested. *Buckley*. A prosecutor has only qualified immunity for statements made to a press conference, even though that may be an important part of his work. *Buckley*. Throughout its development of immunity analysis, the Supreme Court has applied a functional test, rather than a status-of-the-actor test, to the act in question. See e.g., *Forrester v. White*, 484 US. 219, 108 S.Ct. 538, 98 L. Ed. 2d 555 (1988). For prosecutors, only those acts intimately connected with the judicial process are absolutely immune.

Against these standards, the Court evaluates the nineteen Causes of Action in the Third Amended Complaint *seriatim*.

In several places in the Third Amendment Complaint, Plaintiff avers to 42 U.S.C. §1985. To be actionable under this section, a conspiracy must be abased on some racial "or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Macko v. Bryon*, 641 F. 2d 447 (6th Cir 1981). Nowhere

in the Third Amended Complaint does Plaintiff state a claim upon which relief can be granted under 42 U.S.C. §1985, a point which Plaintiff apparently concedes by not responding to Defendant's authority for that proposition. *Glover v. Tower*, 700 F. 2d 556 (9th Cir. 1983), rev'd. on another issue, 467 U.S. 914, 81 L. Ed. 2d 758, 104 S.Ct. 2820 (1984). As to any and all claims under §1985 made in the Third Amended Complaint, Defendant Schumaker's motion to dismiss is GRANTED and all such claims wherever made in the Third Amended Complaint, are DISMISSED WITH PREJUDICE.

FIRST CAUSE OF ACTION

In his First Cause of Action, purportedly brought pursuant to 42 U.S.C. §§1983 and 1985, Mr. Ridder asserts that Mr. Schumaker and defendant Springfield police officers Menda, Marcum, Kerr, and Evans began to investigate him as the possible "North End rapist" on or about July 8, 1988. Mr. Ridder alleges these Defendants:

> ... were charged with possessing the knowledge and skills of like and similarly situated public officers, including the duty to adequately investigate and evaluate information and circumstances of an allege rape. This included knowledge of inherent unreliability of identification testimony of victims, as well as other unique characteristics of such investigators.

Third Amended Complaint, ¶27. He then claims these Defendants received information from Kim Carr concerning alleged criminal conduct but which they should have known

was unreliable; the unreliability is said to be demonstrated by items listen in ¶29. As a result of unprofessionally evaluating this evidence, these Defendants are said to have done two things: "unfairly target[ed] the Plaintiff as a suspect" and "developed further false information concerning the Plaintiff." ¶¶30, 31. The "further false information" is said to be detailed in the Second Cause of Action.

Plaintiff is correct that Mr. Schumaker is not absolutely immune with respect to any acts of his alleged in the First Cause of Action, since they all occurred long before Mr. Schumaker had a probable cause to believe that Mr. Ridder or any other particular person was guilty of the rapes being investigated. See *Buckley*, 113 S. Ct. at 2616.

However, Mr. Schumaker cannot be held liable for any of the acts alleged in the First Cause of Action because they do not violate any clearly established constitutional right of Mr. Ridder. As noted above, the determination of whether any constitutional right was violated is logically antecedent to determining whether the violated right was clearly established at the time a particular official defendant acted. *Siegert v. Gilley*, 500 U.S., 114 L. Ed. 2d 277 (1991); *Silver v. Franklin Twp.*, 966 F. 2d 1031 (6th Cir.. 1992). Plaintiff here has pointed to no law which makes "unfair targeting" of a suspect by a prosecutor a violation of any constitutional right, much less any "clearly established law." Nor has Plaintiff alleged his claim about "development of further false information" with sufficient specificity tot show that it violated any clearly established law.

Part of what Plaintiff seems to be alleging in the First Cause of Action is that the Defendants named there, including Mr. Schumaker, had a duty to conduct a careful investigation, one that utilized the skills they had or should have had in their various capacities as police officers and a prosecuting attorney. There is, however, no clearly established constitutional right to have a prosecuting attorney so act.

Another way of construing the First Cause of Action is to read it as alleging that Mr. Schumaker should not have made the decision to investigate Plaintiff on the basis of Kim Carr's unreliable information. But the Sixth Circuit has explicitly held that a decision to investigate is immune. *Grant v. Hollenbach*, 870 F. 2d 1135 (6th Cir. 1989).[3]

As to Defendant , the First Cause of Action must be DISMISSED WITH PREJUDICE.

SECOND CAUSE OF ACTION

In his Second Cause of Action, Mr. Ridder complains of being subjected to an unconstitutional search which occurred September 8, 1988, pursuant to a search warrant issued by Clark County Common Pleas Judge

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[3] The *Grant* court's conclusion of absolute immunity is questionable in light of *Buckley v. Fitzsimmons*, but *Buckley* had not been decided in 1988 when the decision to investigate Ridder is alleged to have been made and *Buckley* does not conclude there is no immunity for decisions to investigate, but only that it is qualified, not absolute, immunity.

Gerald Lorig.[4] He asserts a right of recovery under 42 U.S.C. §1983.

It was clearly established in September, 1988, that a person has aright not to be searched pursuant to a warrant which is issued upon an affidavit which the affiant knows to be false or which the affiant knows does not establish probable cause for the search. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed. 2d 667 (1978); *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed. 2d 527 (1983).

The Second Cause of Action can fairly be read as alleging that Mr. Schumaker participated in drafting the search warrant affidavit and approving its presentation to Judge Lorig. Whether these activities by a prosecutor are absolutely immune is unclear in light of *Burns v. Reed, supra*. There the Supreme Court found absolute immunity with respect to presentation of oral testimony to a judge in a probable cause hearing preliminary to the issuance of as search warrant. In Indiana, at least in the jurisdiction where the particular warrant was issued, it was apparently the practice to conduct such hearings orally in open court; the judge who issued the search warrant so testified.[5] The Ohio

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[4] In his Memorandum in Opposition (Doc. #161), he also characterizes this Second Cause of Action as being for "investigation or lack thereof." As to Defendant Schumaker, the actionability of this claim is fully dealt with in the portion of this Decision dealing with the First Cause of Action.

[5] *Burns v. Reed* reached the Supreme Court after trial; the district judge there did not rule on the absolute immunity claim until the directed verdict stage.

practice under Ohio R. Crim. P. 41, like the federal practice under Fed. R. Crim. p. 41, is to issue search warrants based on written affidavits, although both Ohio and federal judges are authorized to take supplemental oral testimony. thus in Ohio preparation of a search warrant affidavit is the close functional equivalent of examining the same witness in open court. Since the Supreme Court has emphasized a functional approach in its absolute immunity jurisprudence, it might conclude Mr. Schumaker's alleged actions in preparing the search warrant here are indistinguishable for immunity purposed form what he prosecutor/defendants did in *Burns*. Nevertheless, Justice Whites majority opinion in *Burns* places a great deal of emphasis on the open court aspect of the matter, so it is possible the Supreme Court would find a crucial difference. Accordingly, this Court will assume that Mr. Schumaker is entitled only to qualified immunity with respect to causing the search warrant to issue.

The critical question, then, is whether the search "warrant application is so lacking indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs*, 475 U.S. 3356, 106 S.Ct. 1092, 89 L. Ed. 2d 271 (1986). If an officer or prosecutor obtains a warrant through material false statements, either knowingly or in reckless disregard for the truth, he is liable under §1983. *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989); *Hutsell v. Sayre*, 5 F. 3d 996 (6th Cir. 1993). However, an officer is entitled to qualified immunity unless the warrant is so utterly lacking in probable cause that no officer o reasonable competence would have concluded a warrant should issue. *Malley, supra; Jutsell, supra; Yancey v.. Carroll County*, 876 F. 2d 1238, 1243 (6th Cir. 1989).

In ¶39 of the Third Amended Complaint, Plaintiff alleges the search warrant affidavit contains information which Defendant "knew, or should upon any preliminary inquiry have known, was false" and also omitted facts known to which, if they had been present, would have, to Schumaker's knowledge, eliminated probable cause. Under *Malley v. Briggs*, that states a claim for relief against Mr.Schumaker. Under *Yancy*, whether or not probable cause actually existed for issuance of the search warrant is a jury question, "unless there is only one reasonable determination." 876 F. 2d at 1243.

In ¶¶40-41, Plaintiff recites eight pages of information which he avers defendant **actually knew** at the time he prepared the warrant application but which he failed to disclose to Judge Lorig. Upon examination of that extensive list of information, it seems entirely unlikely that Mr. Schumaker actually knew all of those things to be true on September 7, 1988.[6] However, if he did actually know all of these facts to be true, and sought the search warrant anyway, this Court cannot say that a reasonable jury could not find that there was no probable cause and facts pled must be taken as true for purposes of 12(b)(6) and 12(c) motions.

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[6] For example, that Mr. Ridder had no access to a green International Scout on January 5, 1986 (¶40.D.3), that Ridder was working in Michigan on June 8, 1986 (¶40.L.3), that Ridder had several girlfriends during the time of the rapes (¶40.N.1), or that April 3, 1987, was the first date in four years on which Ridder returned to the Springfield area (¶40.P.4).

What Mr. Schumaker actually knew will of course have to await discovery.[7]

The Court wishes to emphasize it is not basing its decision as to the Second Cause of Action in any way on Plaintiff's assertion that Mr. Schumaker **should have known** these facts, as opposed to actually knowing them. Negligence will not support a claim for relief under §1983. *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). Plaintiff is asserting, as the Court reads ¶¶40-41, that Schumaker **actually knew** these facts and still omitted them from the search warrant application.

Based on the foregoing analysis, Defendant Schumaker's motion to dismiss the §1983 claim in the Second Cause of Action is DENIED.

THIRD CAUSE OF ACTION

Plaintiff's Third Cause of Action is said to arise under 42 U.S.C. §§1983 and 1985. The §1985 claim has been dismissed above. In this count, defendants, Marcum, Menda, Kerr, and Evans are alleged to have caused Mr. Ridder to be arrested for the rapes on September 8, 1988, and then indicted on September 19, 1988.

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[7] Whether Plaintiff and/or his counsel have a reasonable basis in fact for asserting that Mr. Schumaker knew all of these asserted facts to be true on September 7, 1988, will also have to await discovery.

Part of the purpose of the search warrant was to get Mr. Ridder to participate in a line-up, as well as submit bodily samples. On the morning of September 19, 1988, upon execution of the search warrant, he was placed in a line-up and identified by five of the rape victims. Complaints were then sworn to before a deputy clerk of courts and he was held in custody on those complaints and indicted on September 19, 1988.[8]

The Court concludes that Mr. Schuamker is absolutely immune for all acts alleged in the Third Cause of Action. Once Mr. Ridder had been identified by five of the victims, Mr. Schumaker obviously made a decision to prosecute Mr. Ridder. That decision is absolutely immune. *Imbler, supra; Joseph v. Patterson*, 795 F. 2d 549 (6th Cir. 1986); *Macko v Bryoan*, 641 F. 2d 447 (6th Cir. 1981). Presentation of the case to the grand jury is likewise absolutely immune under *Imbler*; this aspect of *Imbler* is reaffirmed in both *Burns v. Reed* and *Buckley v. Fitzsimmons*.

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[8] Plaintiff attaches an arrest warrant to the Third Amended Complaint as Ex. 9 and the Indictment as Ex.10. Exhibit 9 is the arrest warrant which issued, on defendant Schumaker's motion, once an indictment had been returned. However, the Court understands Plaintiff to be complaining of his pre-indictment arrest as well. No documentary proof has been offered that this was on a warrant. Once he was charged in the Springfield Municipal Court on September 8, 1988, he should have been taken before a judge of that Court, advised of his rights, and released on bond or committed by mittimus in lieu of bond. Ex. 14 to the Third Amended Complaint shows the Jail Commitment Form used by the arresting officer after the initial formal charges were made. No other parts of the formal pre-indictment paperwork are before this Court.

To the extent the Third Cause of Action purports to allege or intends to allege a claim against Mr. Schumaker for failure to investigate, it fails to state a claim upon which relief can be granted on the same basis as set forth above with respect to the First Cause of Action.

As to Defendant, the Third Cause of Action is DISMISSED WITH PREJUDICE.

FOURTH CAUSE OF ACTION

In the Fourth Cause of Action, Mr. Ridder asserts that Mr. Schumaker and other defendants violated his constitutional rights by subjecting him to improper line-ups; ¶63 avers the various ways in which the line-ups were improper.

First of all, use of an improper line-up is not actionable under §1983. The use of an unnecessarily suggestive lineup does not itself violate a constitutional right, but merely the prophylactic rules of *Braithwaite* and *Stovall*. *Hutsell v. Sayre*, 5 F. 3d 996 (6th Cir. 1993).

Secondly, Mr. Schumaker is entitled to qualified immunity for placing Mr. Ridder in the line-up in that Plaintiff has presented no case authority to the effect that placing a criminal defendant in an improper line-up was a clearly established constitutional violation in September, 1988.

Because the line-up here arguably occurred before Mr. Schumaker had probable cause to believe Mr. Ridder had committed any of the rapes, Mr. Schumaker's involvement in arranging the line-up is arguably outside the scope of prosecutorial absolute immunity but the Court does not attempt to decide that question here.

As to Defendant, the Fourth Cause of Action is DISMISSED WITH PREJUDICE.

FIFTH CAUSE OF ACTION

Plaintiff has moved to dismiss the Fifth Cause of Action as against Mr. Schumaker without prejudice (Doc. #162). Because of the stage of the proceedings, Mr. Schumaker would have been entitled under Fed. R. Civ. P. 41 to insist on a decision on the merits, but instead he has acquiesced in the dismissal without prejudice, which is hereby GRANTED.

SIXTH CAUSE OF ACTION

In the Sixth Cause of Action, Plaintiff purports to state a claim for relief under 42 U.S.C. §1983 against Mr. Schumaker for unnecessarily publicizing facts relating to Mr. Ridder's arrest and charges for the purpose of promoting Mr. Schumaker's then pending reelection as prosecutor.

In ¶80, Plaintiff asserts that these statements violated a number of norms of professional ethics applicable to lawyers. These allegations are immaterial since §1983 does not create a cause of action for violation of attorney ethics.

There is no absolute immunity for such statements. *Buckley v. Fitzsimmons.* However, making such statements violates no constitutional right of Mr. Ridder. *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L.Ed. 2d 405 (1976). At the very least Mr. Schumaker is entitled to qualified immunity for such statements as Plaintiff has pointed to no case authority clearly establishing such statements violated a criminal defendant's constitutional rights in 1988.

As to Mr. Schumaker, the Sixth Cause of Action is DISMISSED WITH PREJUDICE.

SEVENTH CAUSE OF ACTION

As with the Fifth Cause of Action, Mr. Ridder has moved to voluntarily dismiss the Seventh Cause of Action as to Mr. Schumaker. Accordingly , said cause of action is, as to Mr. Schumaker, DISMISSED WITHOUT PREJUDICE.

EIGHTH CAUSE OF ACTION

On its face the Eighth Cause of Action purports to state claims for relief against Defendant and others (defined by Plaintiff as "8CD"). However, in his Memorandum in Opposition (Doc. #161), Plaintiff confirms that this cause of

action is not intended to assert any claims against Mr. Schumaker. Accordingly, as to Defendant, the Eighth Cause of Action is DISMISSED WITH PREJUDICE.

NINTH CAUSE OF ACTION

All parties understand that no claims for relief are, or are intended to be, stated against Defendant in the Ninth Cause of Action.

TENTH CAUSE OF ACTION

On July 8, 1988, Mr. Ridder very seriously injured his hand at work. Indeed, this injury may have led to his being charged because apparently Kim Carr, one of the victims, allegedly "recognized" his voice while he was hospitalized, reported this to the Springfield Police, and thereby initially focused attention on Mr. Ridder.

At the time he was arrested on September 8, 1988, Mr. Ridder had not, the Third Amended Complaint alleges, recovered from the surgery he had to repair the injury. The Third Amended Complaint goes on to allege that all Defendants knew of the injury, that substantial additional treatment was necessary, but that the jail doctor, Walter Lawrence, was deliberately indifferent to the risk and that Dr. Lawrence and Sheriff Kelly were deliberately indifferent to Ridder's injuries.

Mr. Schumacker is qualifiedly immune from suit on the Tenth Cause of Action because Plaintiff has not pointed to any case authority clearly establishing as of September, 1988, that a prosecuting attorney violated a criminal

defendant's constitutional rights by continuing to prosecute him after indictment, knowing or being deliberately indifferent to the fact that he would be exposed to cruel and unusual punishment by being incarcerated in lieu of bond.

As to Defendant, the Tenth Cause of Action is DISMISSED WITH PREJUDICE.

ELEVENTH CAUSE OF ACTION

The Eleventh Cause of Action arises under this Court's supplemental jurisdiction, 28 U.S.C. §1367, and is for Ohio common law medical negligence.

Plaintiff has defined the Eleventh Count Defendants ("11CD") as including only Dr. Lawrence and Sheriff Kelly (Doc. #143, ¶131). However, in ¶135 he avers that all the other Defendants are jointly and severally liable with Lawrence and Kelly " as their unlawful acts placed him into the situation where it was reasonably foreseeable that the malpractice would occur."

This being a state law claim, the questions of absolute or qualified immunity under §1983 do not arise. The parties have not briefed the question whether Mr. Shumaker would be immune under Ohio Revised Code Chapter 2744.

Mr. Shumaker asserts that this count fails to state a claim against him upon which relief can be granted. In response, Plaintiff relies on *Travelers Indemnity Co. v. Trowbridge*, 41 Ohio St. 82 (1934); *Whitt v. Hutchinson*,

43 Ohio St. 2d 53 (1975); and *Tanner v. Espey*, 128 Ohio St. 82 (1934).

Plaintiff is of course right to rely on Ohio authority, since this Court must apply Ohio substantive law in determining questions within its supplemental jurisdiction. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 2d 1188 (1938). In applying state law, the Sixth Circuit follows the law of the State as announced by that State's supreme court. *Ray Industries, Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 758 (6th Cir. 1992); *Miles v. Kohli & Kaliher Assocs.*, 917 F. 2d 235, 241 (6th Cir. 1990) "where the state supreme court has not spoken, or task is to discern, form all available sources, how that court would respond if confronted with the issue." Id.; *In re Akron-Cleveland Auto Rental, Inc.*, 921 F. 2d 659, 662 (6th Cir. 1990).

None of the cases cited by Plaintiff support a cause of action against Mr. Schumaker In *Travelers Indemnity Co. v. Trowbridge*, the Ohio Supreme Court reaffirmed the principle it had adopted in *Tanner v. Espey* that an original tortfeasor who proximately causes bodily injury to a person is also the proximate cause of subsequent injury by a negligent treater. But Mr. Schumaker did not cause the original bodily injury; indeed, there are not facts pled to indicated the original injury was tortuously caused at all.

It is clear the deficiency in the Eleventh Cause of Action as to Mr. Schumaker is not one which can be cured by re-pleading. Therefore, as to Mr. Schumaker, the

Eleventh Cause of Action is DISMISSED WITH PREJUDICE.

TWELFTH CAUSE OF ACTION

The Twelfth Cause of Action is a supplemental claim under Ohio law for defamation. Any determination of whether the absolute immunity for statements in connection with judicial proceedings protects Mr. Schumaker with respect to his claim will have to await discovery. The Motion to Dismiss as to the Twelfth Cause of Action is DENIED.

THIRTEENTH CAUSE OF ACTION

The Thirteenth Cause of Action is a supplemental claim under Ohio law for malicious prosecution. Plaintiff has appropriately pled the elements of a cause of action for malicious prosecution under Ohio law. *Crawford v. Euclid National Bank*, 19 Ohio St. 3d 135, 483 N.E.2d 1168 (1985). Defendant does not contest the adequacy of the pleading, but claims absolute immunity under state law other that Ohio Revised Code Ch. 2744.

Neither party has cited any Ohio Supreme Court case authority in point on the question of whether a prosecutor is immune from liability on a malicious prosecution claim. Defendant relies upon *Hunter v. City of Middletown*, 31 Ohio App. 3d 109, 509 N.E. 2d 93 (Butler Cty. 1986). Plaintiff protests that Hunter was a §1983 case, but the opinion makes clear that both federal and state claims were

presented. The Butler County Court of Appeals referred to federal precedent, including *Imbler*, in finding there was immunity, but this is hardly surprising since immunity analysis under §1983 starts by looking at common law immunities in 1871 when the §1983 was adopted, the theory being Congress would not have repealed all the existing immunities *sub silentio*. See particularly Justice Scalia's and Justice Kennedy's opinions in *Buckley*.

The Court concludes that the Ohio Supreme Court would continue to recognize an absolute immunity from liability for malicious prosecution for Ohio prosecutors. Accordingly, the Thirteenth Cause of Action is DISMISSED WITH PREJUDICE as to Defendant Schumaker.

FOURTEENTH CAUSE OF ACTION

The Fourteenth Cause of Action is a supplemental claim under Ohio law for false arrest and false imprisonment. This cause of action is DISMISSED WITH PREJUDICE as to Defendant Schumaker upon the same authority and analysis as the Thirteenth Cause of Action.

FIFTEENTH CAUSE OF ACTION

The Fifteenth Cause of Action attempts to state a claim under Ohio law for relief for abuse of process, but fails to do so. Plaintiff makes no allegation that process-which in a criminal case in Ohio is either a summons or an

arrest warrant, See Ohio R. Crim P. 4 --- issued in his state criminal cases was used after it was issued for a purpose other than that for which it was designed. See*Clermont Environ. Reclamation Co. v. Hancock*, 16 Ohio App. 3d 9, 474 N.E. 2d 357 (Clermont Cty. 1984). The Court is unaware of any process in the state criminal case except the arrest warrant on the indictment which was used precisely for the purpose for which it was designed: to arrest Mr. Ridder.

The Fifteenth Cause of Action is accordingly DISMISSED WITH PREJUDICE for failure to state a claim upon which relief can be granted. While such dismissals are usually without prejudice, Plaintiff here has been given ample opportunity to plead his claims properly and to amend.

SIXTEENTH CAUSE OF ACTION

The Sixteenth Cause of Action is another supplemental claim under Ohio law, which Plaintiff characterizes as being for intentional and/or negligent infliction of emotional distress.

Ohio does not recognize the tort of negligent infliction of emotional distress in the circumstances pleaded by Plaintiff. See *Clifton v. Can Dresser Corp.*, 73 Ohio App. 3d 202 (Huron Cty. 1991); *Bartlett v. Daniel Drake Mem. Hosp.*, 75 Ohio App. 3d 334 (Hamilton Cty. 1991); *Hatlestad v. Consol. Rail Corp.*, 75 Ohio App. 3d 184, 598 N.E. 2d 1302 (1991); *Tohline v. Central Trust Co.*, N.A.,

48 Ohio App. 3d 280, 549 N.E. 2d 1223 (1988); *Hanly v. Riverside Methodist Hosp.*, 78 Ohio App. 3d 73 (1991); *Antalis v. Ohio Dept. of Commerce*, 68 Ohio App. 3d 650, 589 N.E.2d 429 (Franklin Cty. 1990). *High v. Howard*, 64 Ohio St. 3d 82, 592 N.E. 2d 818 (1992), *overruled on other grounds, Gallimore v. Childrens Hospital Medical Center*, 67 Ohio St. 3d 244, 617 N.E. 2d 1052 (1993); *Strawser v. Wright*, 80 Ohio App.. 3d 751, 610 N.E. 2d 610 (Preble Cty. 1992). Compare *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 447 N.E. 2d 109 (1983), and *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E. 2d 759 (1983).

With respect to the claim of intentional infliction of emotional distress, Ohio of course has recognized that tort. *Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 453 N.E. 2d 666, (1983). However, prosecutors are absolutely immune from liability for intentional infliction of emotional distress for the sorts of acts alleged against Defendant Schumaker in this cause of action. *Hunter v. City of Middletown*, 31 Ohio App. 3d 109, 509 N.E. 2d 93 (Butler Cty. 1986). Accordingly, as to Defendant Schumaker, the Sixteenth Cause of Action is DISMISSED WITH PREJUDICE.

SEVENTEENTH CAUSE OF ACTION

Plaintiff's Seventeenth Cause of Action is under Ohio law for civil conspiracy and civil recovery for a criminal act. A person cannot be held liable for conspiring to what he is legally entitled to do, so any claim against Defendant Schumaker for doing acts as to which this Court

has held he is immune form suit or liability must be dismissed with prejudice. That leaves the Second and Twelfth Causes of Action.

The parties' arguments about potential liability of Mr. Schumaker on the Seventeenth Cause of Action are at this point insufficiently focused to permit a final decision. Accordingly, the Motion to Dismiss as to the Seventeenth Cause of Action is DENIED without ruling on its merits and without prejudice to its renewal.

EIGHTEENTH CAUSE OF ACTION

Plaintiff's Eighteenth Cause of Action is for "false light" invasion of privacy. The Sixth Circuit Court of Appeals has determined that Ohio did not recognize this tort as of June 17, 1987. *Angelotta v. American Broadcasting Corp.*, 820 F. 2d 806 (6th Cir. 1987). No subsequent authority has been cited which would undermine that holding. The Eighteenth Cause of Action is DISMISSED WITH PREJUDICE as to Defendant.

NINETEENTH CAUSE OF ACTION

Plaintiff's Nineteenth Cause of Action purports to be a supplemental claim arising under Ohio law for "wanton misconduct" which Plaintiff asserts is a separate tort in Ohio. However, the Ohio Supreme Court cases relied upon by Plaintiff do not recognize any such separate tort. Rather,

they hold that , when the negligence involved in operating a motor vehicle becomes "wanton negligence," the defendant loses his or her defense of contributory negligence.

There is no such separate tort under Ohio law and Plaintiff's Nineteenth Cause of Action is, on that account, DISMISSED WITH PREJUDICE.

Jan.24, 1994 /s/_____

Michael R. Merz

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN MICHAEL RIDDER:		
Plaintiff(s),	:	Case No. C-3-90-003
-vs-	:	Magistrate Judge Michael R. Merz
CITY OF SPRINGFIELD, OHIO, et al.,	:	
Defendant(s).	:	

SCHEDULING ORDER

Filed February 15, 1994

This case came on for scheduling conference pursuant to Fed R. Civ. Proc. 16 at 9:30 a.m. on February 14, 1994. All parties of record participated by their trial attorneys of record, except that Mr. DeBell stood in for Mr. Butz.

PERTINENT SETTINGS

1.	Settlement demand by Plaintiff(s) on Defendant(s)	March 1, 1994
2.	Discovery plan due	already filed
3.	Last date for filing motions directed to the pleading (including motions to dismiss	passed

under Fed. R. Civ. P. 12(b)(6)

4. Date to exchange and file lists of *lay witnesses with synopsis of* expected testimony[1]

Plaintiff	May 1, 1994
Defendants	July 1, 1994

5. Dates to exchange lists and of expert witnesses and furnish copies of expert reports[2] to opposing counsel and the Court

Plaintiff	May 15, 1994
Defendant	August 15, 1994

6. Discovery cut off November 1, 1994

Any interrogatories and or requests for production of documents shall be served not later than April 1, 1994; any requests for admissions shall be served not later than May 15, 1994.

Defendants shall complete depositions not later than the following dates: Plaintiff and attorney Ronald Morris not later than June 1, 1994; any of Plaintiff's medical experts not

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[1] The purpose of the lay witness list is to disclose those persons known to the filing party to have relevant information which is expected to be offered at trial and to enable the opposing party to determine the necessity for deposition.

[2] The expert reports required by this Order shall comply with Fed. R. Civ. P. 26(a)(2) (as amended December 1, 1993).

later than August 1, 1994; any other experts identified by Plaintiff not later than October 1, 1994; any other lay witnesses identified by Plaintiff not later than September 1, 1994; and any other witnesses not later than November 1, 1994.

Plaintiffs shall complete the depositions of any lay witnesses identified by Defendants not later than September 1, 1994, and any experts identified by Defendants not later than November 1, 1994.

7. Last date to file dispositive motions not directed to the pleadings: (e.g. summary judgment motions) — December 30, 1994

   Memoranda contra due — January 23, 1995
   Reply Memoranda due — February 6, 1995

(These dates apply to any summary judgment motions filed on the last date allowed; dispositive motions filed earlier in the case shall be treated in accordance with S.D. Ohio L. R. 7.2)

8. Date to file joint proposed final pretrial order — February 24, 1995

9. Final pretrial conference in person at 4:30 p.m. — February 27, 1995

10. Trial to a jury for ten days commencing at 9:00 a.m. — March 6, 1995

The joint proposed final pretrial order shall be in the form attached hereto. The Court wishes to emphasize that the proposed final pretrial order must be **jointly** prepared; in

the absence of such a draft joint order, no final pretrial conference will be held, the trial will be continued, and counsel will be subject to sanctions, including dismissal for failure to prosecute. The instructions in the form of final pretrial order attached have the force of court order.

All discovery, including any depositions for presentation at trial in lieu of appearance, shall be completed, and not merely requested, by the discovery cut off date. Parties who undertake to extend discovery by agreement beyond the cut off date without Court approval do so at the risk the Court may not permit its completion prior to trial. Counsel shall keep the Court currently advised of the status of discovery in this case and promptly bring to the Court's attention any discovery disputes requiring court resolution.

The Discovery Plan (Doc. #168), which is hereby APPROVED, may be altered or amended only by leave of court. Upon approval by the Court, the joint discovery plan becomes a scheduling order of this Court, and parties are subject to sanctions under Fed. R. Civ. Proc. 16(f) for failure to comply.

The attention of counsel is called to amendments to the Federal Rules of Civil Procedure which became effective December 1, 1993, particularly with respects to expert reports and the exchange of witness lists and trial exhibits.

Defendant Lawrence has filed a Motion for Severance and Separate Trial (Doc. #169). All other Defendants are granted to and including February 21, 1994, to file motions joining said motion in part or in whole, or opposing it. Plaintiff shall file his memorandum contra

within the time allowed by S.D. Ohio L. R. 7.2 as calculated from February 21, 1994.

February 14, 1994. /s/_____

Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

STEPHEN M. RIDDER,

Plaintiff(s), : Case No. C-3-90-003

-vs- Magistrate Judge Michael R. Merz

CITY OF SPRINGFIELD, OHIO, et al.,

Defendant(s). :

ORDER REGARDING PLAINTIFF'S "NOTICE OF PROVISION OF REPORTS OF PLAINTIFF'S EXPERT WITNESSES"

Filed May 17, 1994

This case is before the Court sua sponte upon the filing of Plaintiff's "Notice of Provision of Reports of Plaintiff's Expert Witnesses."

On February 14, 1994, after a scheduling conference, this Court entered its Scheduling Order (Doc. #170). That Order requires at ¶5 that Plaintiff file with the Court and serve on opposing counsel, not later than May 15, 1994, a list of expert witnesses and furnish copies of their reports. At least two points in the Order, the attention of counsel is called to the amendments to Fed. R. Civ. P.

26(a)(2), effective December 1, 1993, regarding the content of expert reports.

With respect to Robert E. Berry, Joseph Paley, Ramchandra Ramnath, G. James Sammarco, Barry Duncan, Peter Barre, and David Kaehr, the Notice indicates their reports have been forwarded. However, no such reports have been filed with the Court with the Notice. Both the Scheduling Order and Fed. R. Civ. P. 26(a)(2) require that the reports be filed with the Court.

The Notice recites that Dr. Barre's report and Dr. Kaehr's report are "being supplemented." The date by which the reports were to be complete was May 15, 1994.[1] Any supplements thereafter are untimely.

As to Dr. Arthur Schramm, the Notice recites that Dr. Schramm has failed to forward a report despite numerous requests. Proposed expert witnesses who refuse to comply with the Federal Rules of Civil Procedure will not be permitted to testify. Dr. Schramm is hereby precluded from being an expert witness in this case.

Plaintiff list as expert witnesses "each Defendant." With respect, the Court thinks it highly unlikely that Plaintiff will call any of the Defendants to render expert opinions in his case in chief. But even if that is the Plaintiff's intention, the Defendants are entitled to know what expert opinions

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[1] By operation of Fed. R. Civ. P. 6, the time was extended to May 16, 1994.

Plaintiff expects to elicit from them and to be prepared to rebut themselves.

With respects to Ron Morris, Plaintiff asserts that "[n]o report is expected because Mr. Morris has already had his deposition taken." Neither Fed. R. Civ. P. 26(a)(2) nor the Scheduling Order exempts those who have already been deposed from giving reports. The Court further notes that, to the extent Mr. Morris's deposition may disclose what he would testify to, the deposition transcript has not been filed with the Court.

With respect to Terry Lewis, Larry Greger, Jan Spitler, Kelly Malcolm, and Dick Emmons, Plaintiff asserts that their reports have not yet been received, but offers no evidence of when their reports were sought. Each of them is precluded from testifying as an expert witness in this case.

In accordance with the foregoing findings, it is hereby ORDERED:

1. Plaintiff shall file the reports of Robert E. Berry, Joseph Paley, Ramchandra Ramnath, G. James Sammarco, Barry Duncan, Peter Barre, and David Kaehr with the Court not later than May 23, 1994. Reports which do not conform to Fed. R. Civ. p. (sic) 26(a)(2) will be stricken and the witnesses with which they are associated will not be permitted to testify;

2. Drs. Barre and Kaehr will not be permitted to testify to any matter proposed to be shown by any supplemental report unless a) the supplemental report is filed and served not later than May 30, 1994, and b) Plaintiff shows good cause for

failing to supplement the prior reports by the time required by the Scheduling Order;

3. Not later than May 23, 1994, Plaintiff shall file a statement of what expert testimony he expects to elicit from each of the Defendants;

4. Not later than May 30, 1994, Plaintiff shall file an expert report from Ron Morris; and

5. Proposed experts Arthur Schramm, Terry Lewis, Larry Greger, Jan Spitler, Kelly Malcolm, and Dick Emmons are STRICKEN from Plaintiff's expert witness list and precluded from testifying herein.

Plaintiff's Notice fails to comply with Fed. R. Civ. P. 26(a)(2) with respect to each and every witness listed. With respect to six out of fourteen (not counting the Defendants), Plaintiff avers that no report is yet available, although this case is four and one-half years old. The Court advised the parties in February, 1994, that it would adhere rigorously to the schedule adopted, which allowed an entire additional year to prepare for trial, despite that fact the case was then over a year old. The Court intends to adhere to that advice and the adopted schedule.

May 17, 1994

/s/
Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

STEPHEN M. RIDDER,

Plaintiff(s), : Case No. C-3-90-003

-vs-

Magistrate Judge Michael R. Merz

CITY OF SPRINGFIELD, OHIO, et al.,

Defendant(s). :

ORDER RESPECTING PLAINTIFF'S PROPOSED EXPERT WITNESSES AND DENYING PLAINTIFF'S MOTION TO STRIKE

Filed June 2, 1994

On May 17, 1994, the Court entered its Order regarding Plaintiff's expert witness list. That Order provided in pertinent part:

> 1. Plaintiff shall file the reports of Robert E. Berry, Joseph Paley, Ramchandra Ramnath, G. James Sammarco, Barry Duncan, Peter Barre, and David Kaehr with the Court not later than May 23, 1994.

Reports which do not conform to Fed. R. Civ. p. (sic) 26(a)(2) will be stricken and the witnesses with which they are associated will not be permitted to testify;

2. Drs. Barre and Kaehr will not be permitted to testify to any matter proposed to be shown by any supplemental report unless a) the supplemental report is filed and served not later than May 30, 1994, and b) Plaintiff shows good cause for failing to supplement the prior reports by the time required by the Scheduling Order;

3. Not later than May 23, 1994, Plaintiff shall file a statement of what expert testimony he expects to elicit from each of the Defendants;

4. Not later than May 30, 1994, Plaintiff shall file an expert report from Ron Morris; and

5. Proposed experts Arthur Schramm, Terry Lewis, Larry Greger, Jan Spitler, Kelly Malcolm, and Dick Emmons are STRICKEN from Plaintiff's expert witness list and precluded from testifying herein.

In response to the Order, Plaintiff has made a number of filings which are now before the Court for rulings.

On May 23, 1994, Plaintiff filed his [second] Notice of Provision of Reports of Plaintiff's Expert Witnesses to the Court (Doc. #183). Attached are the purported reports of Robert E. Berry, Joseph Paley, Ramchandra Ramnath, G.

James Sammarco, Barry Duncan, Peter Barre, and David Kaehr. These are the persons from whom reports are required by ¶ 1 of the May 17th Order. Plaintiff was expressly advised in that Order that:

> Reports which do not conform to Fed. R. Civ. p. (sic) 26(a)(2) will be stricken and the witnesses with which they are associated will not be permitted to testify.

The reports of Mr. Berry, Dr. Paley, Dr. Ramnath, Dr. Sammarco, Mr. Duncan, Dr. Barre, and Dr. Kaehr do not comply with Fed. R. Civ. P. 26(a)(2); they are stricken and these witnesses will not be permitted to testify.

The same documents (Doc. #183) lists the expert testimony which Plaintiff expects to elicit from each of the Defendants. To the extent that Plaintiff is able to elicit from the Defendants testimony consistent with these expectations which are relevant to his case and the witnesses concede that they are qualified to give expert opinions in the areas cited, Plaintiff may call them as experts.

In response to ¶ 2 of the May 17th Order, Plaintiff has submitted an Affidavit of his counsel attempting to show good cause for the delay in filing a supplemental report and an attached supplemental report of Dr. Peter Barre. The supplemental report does not add the information to the original report which made it nonconforming to Fed. R. Civ. P. 26(a)(2). Furthermore, the Affidavit does not show good cause. The Scheduling Order of February 15, 1994, required the disclosure of expert witnesses and the filing of reports by May 15, 1994. As purported good cause,

counsel says he did not decide to use Dr.. Barre as an expert witness until May 3, 1994. Dr. Barre has, by counsel's own admission, been a treating physician of Mr. Ridder apparently since July 3, 1988 (see his report attached to Doc. #183), which is before any of the causes of action pled in this arose and is almost six years ago. Why did it take counsel until May 3, 1994, to decide to use Dr. Barre as an expert witness? The Court is not concerned about the time between counsel's decision on May 3 and the filing of Dr. Barre's supplemental report 28 days later. What the Court is concerned about is the length of time it took Plaintiff's counsel to decide to call him as a witness and then request the supplemental report. No explanation for why the decision could not have been made or was not made before May 3rd is offered. In the absence of such an explanation, in the context of a case which has been pending since January, 1990, there has been no showing of good cause.

No supplemental report of Dr. Kaehr as required by ¶ 2 has been filed and in any event he has been stricken because his original report does not comply with Fed. R. Civ. P. 26(a)(2).

No expert report has been filed from Ron Morris and his name is stricken from Plaintiff's expert witness list.

Plaintiff has moved (Doc. #184) to add Richard Emmons back to his expert witness list; Mr. Emmons' name has been stricken in the May 17th Order. Counsel are correct in representing that Mr. Emmons' report attached to Doc. #184, was in fact previously filed with this Court. However, the report of Mr. Emmons does not comply with Fed. R. Civ. P. 26(a)(2). Accordingly, the Motion to add

Mr. Emmons as an expert is DENIED without prejudice to its renewal if the missing information required by the Rule is supplied to the Court and opposing counsel not later than June 8, 1994, and without prejudice to any objections Defendants may timely raise.

Plaintiff's Motion (Doc. #186) to Strike Defendant Schumaker's Motion to Dismiss the Seventeenth Cause of Action (Doc #180) is DENIED.

June 1, 1994

/s/
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DYTON

STEPHEN M. RIDDER,	:	
Plaintiff(s),	:	Case No. C-3-90-003
vs.	:	Magistrate Judge Michael R. Merz
CITY OF SPRINGFIELD, OHIO, et al.,	:	
Defendant(s)	:	

DECISION AND ORDER DENYING MOTIONS TO SEVER AND GRANTING MOTIONS TO BIFURCATE

Filed June 30, 1994

This case is before the Court upon the following motions:

1. Motion of Defendant Lawrence for Severance and Separate Trial (Doc. #169), seeking severance of the claims against Dr. Lawrence under Fed. R. Civ. P. 21, or alternatively an order regarding notice of possible testimony against Dr. Lawrence in deposition testimony and bifurcation of the claims against Dr, Lawrence, Sheriff Kelly, and Clark County as they relate to this individual matter and as against

Sheriff Kelly and Clark County as a matter of custom, practice, or policy;

2. Motion of Defendants Kelly and Clark County for Severance and Separate Trial (Doc. #171), incorporating by reference Dr. Lawrence's arguments;

3. Motion for Separate Trial of Defendant City of Springfield, Ohio (Doc. #172).

Plaintiff opposes all of the relief sought: Memorandum in Opposition to Motion for Bifurcation (Doc. #173)(directed to the City of Springfield's Motion), Memorandum in Opposition to Motion for Severance and Separate Trials (Doc. #174)(directed to Dr. Lawrence's Motion), and Memorandum in Opposition to Motion for Severance and Separate Trials (Doc. #175). The City of Springfield has filed a Reply Brief (Doc. #176) as has Dr. Lawrence (Doc. #177).

No adequate case has been made for severing the claims against any of the Defendants from other claims. There is sufficient relationship, at least temporal, among the acts alleged in the Third Amended Complaint, to make it appropriate for this to continue as one case rather than two or more. The motions for severance under Fed. R. Civ. P. 21 are DENIED.

The Court also finds itself unable to accede entirely to Dr. Lawrence's request that Plaintiff specify in each notice of deposition whether the deponent is expected to give testimony which may relate to the claims against Dr. Lawrence since, as Plaintiff's counsel points out, it is not

possible to know in advance what a deponent may disclose. That request is DENIED as to discovery depositions. If, however, Plaintiff intends to depose someone for purposes of perpetuation of testimony (i.e., if Plaintiff expects the witness to be unavailable for trial), Plaintiff shall include in any notice of any such deposition an indication of whether the witness is to give testimony relative to the claims against Dr. Lawrence.

The motions for bifurcation, however, are well taken.

First of all, there are the requests from the political subdivisions - Clark County, Sheriff Kelly in his official capacity, and the City of Springfield - to separate for trial the issues of their liability from that of the individual officers. In order for the subdivisions to be held liable, it must be shown that they had a custom, practice, or policy which caused the deprivation of Plaintiff's rights. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 98 S.Ct 2018, 56 L.Ed.2d 611 (1978). It is not presently known how Plaintiff intends to prove this element of his case, but one possible method of attempted proof - an inference from numerous other similar acts by other police officers or jail personnel - creates an obvious likelihood of prejudice against the individual Defendants. For that reason, it has become the practice in this Court, at least for District Judge Rice, to try claims against the subdivision separately. See, e.g., *Tinch v. Dayton*, C-3-89-263 (order of 3/15/93); *Ealy v. Dayton*, C-3-90-159 (Decision and Entry of February 7, 1994). As Judge Rice points out in his Decision in *Ealy*, assuming a jury verdict against individual officers, indemnification of those officers by the subdivision may moot the need to try the "custom and practice" claim against

the subdivisions. If there is no indemnification agreement at the time of any verdict against the individuals, then it will be necessary to proceed with the additional proof. The Court is not deciding at this time whether or not a separate jury would be impaneled for additional proof, but would be inclined to impanel a new jury.

The second request for bifurcation is to separate the claims relating to lack of medical treatment during incarceration from those relating to the incarceration itself. The Court is, at least at present, not persuaded by Plaintiff's argument that Dr. Lawrence is a successor tortfeasor to any tortious acts of the Springfield police officer Defendants in the same way that there were successor tortfeasors in *Travelers Indemnity Co. v. Trowbridge*, 41 Ohio St. 2d 11, 321 N.E.2d 787 (1975): whatever wrongs they may have done him, the individual Defendant police officers did not cause the initial injury to Mr. Ridder's hand. Dr. Lawrence may thus be prejudiced by the presentation of evidence relating to the allegedly wrongful acts of the individual officers.

Furthermore, there is no particularly good reason to require the jury to listen to medical testimony before deciding the liability of the individual Defendants. That testimony appears to be separable. The test in the case is not whether Plaintiff suffered injury, considering "the totality of the circumstances." Different wrongs are alleged which can be tried separately without diseconomies in presentation of evidence or in pretrial discovery.

Accordingly, the motions to bifurcate the claims relating to lack of medical treatment and against the political subdivisions "custom, policy, or practice" are GRANTED.

IT IS SO ORDERED.

June 30, 1994

/s/_____

Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DYTON

STEPHEN M. RIDDER,	:	
Plaintiff(s),	:	Case No. C-3-90-003
vs.	:	Magistrate Judge Michael R. Merz
CITY OF SPRINGFIELD, OHIO, et al.,	:	
Defendant(s)	:	

DECISION AND ORDER DENYING, WITHOUT PREJUDICE, PLAINTIFF'S MOTION FOR MODIFICATION OF ORDER AND DECISION

Filed July 11, 1994

This case is before the Court upon Plaintiff's Motion for Modification or [sic] Order and Decision (Doc. #211).

In the Motion, Plaintiff seeks to modify this Court's Order of June 2, 1994, to obtain leave for thirty days "to comply with the recently revised provisions of Fed.Civ.R. 26(a)(2) due to the fact that none[1] of the Plaintiff's counsel

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[1] The Motion is signed only by Mr. Brannon; presumably, however, he is representing to the Court that neither he nor Mr. Lopez [sic] was aware of the Rules changes.

were familiar with the revision of Fed. Civ. R. 26(a)(2)." (Doc. #211, p.2).

The Motion as filed claims entitlement to relief under Fed. R. Civ. P. 60(b)(1) on grounds of excusable neglect. However, this claim is made in completely conclusory fashion: counsel has not said what the neglect consists of or why the Court should find it to be excusable.

In addition, the Motion is not accompanied by expert reports complying with Fed. R. Civ. P. 26(a)(2) for those experts whom Plaintiff proposes to call. The Court agrees with Plaintiff's counsel that expert testimony is probably crucial to Plaintiff's case, especially with respect to the medical claims, and accepts Plaintiff's counsel's judgment that he cannot proceed to trial without expert testimony. But while it is important for the Plaintiff to have the assistance of expert witnesses, it is also important for the Court and the Defendants to have disclosure of what those witnesses propose to say. The reason why the preclusion order was entered was that the expert reports required by Rule 26(a)(2) had not been furnished. The Rules Committee and the Supreme Court have determined what those reports should contain.

Accordingly, the Motion is denied without prejudice to its renewal if accompanied by:

1. Affidavits from each of Plaintiff's counsel setting forth the facts which are alleged to constitute excusable neglect, and

2. A report complying with Fed. R. Civ. P. 26(a)(2) from each expert whom Plaintiff proposes to call.

July 11, 1994 /s/_____

Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

STEPHEN M. RIDDER,

Plaintiff(s), : Case No. C-3-90-003

-vs-

Magistrate Judge Michael R. Merz

CITY OF SPRINGFIELD, OHIO, et al.,

Defendant(s). :

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT SCHUMAKER'S MOTION TO DISMISS THE SEVENTEENTH CAUSE OF ACTION IN THE THIRD AMENDED COMPLAINT

Filed July 27, 1994

This case is before the Court upon Defendant Stephen A. Schumaker's Motion to Dismiss the Seventeenth Cause of Action of Plaintiff's Third Amended Complaint (Doc. #180) to which Plaintiff has responded (Doc. #198) and in support of which Defendant Schumaker has filed a Reply Memorandum (Doc. #200). The motion is made

pursuant to Fed. R. Civ. P. 12(b)(6), asserting that the Seventeenth Cause of Action fails to state a claim upon which relief can be granted.

As this Court has frequently reminded these parties, the test for dismissal under Fed. R. Civ. P. 12(b)(6) is stringent one:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Nishiyama v. Dickson Cty.*, 814 F.2d 277 (6th Cir. 1987)(en banc); *Collins v. Nagle*, 892 F. 2d 489 (6th Cir. 1989). For purposes of the motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff and its allegations taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Westlake v. Lucas*, 537 F. 2d 857 (6th Cir. 1976); *Craighead v. E.F. Hutton & Co.*, 899 F. 2d 485 (6th Cir. 1990).

In the Seventeenth Cause of Action, Plaintiff purports to plead "a pendent state law claim for civil conspiracy and civil recovery for a criminal act which are being plead together as proof of one in support of the other."[2]

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[2] Plaintiff's counsel has used the phrase "plead together as proof of one in support of the other" several times with respect to the Seventeenth Cause of Action as if it were a

Defendant Schumaker, in the first branch of his Motion, argues that Plaintiff has not adequately pleaded a claim for conspiracy. The elements of a civil conspiracy in Ohio are (1) a malicious combination; (2) two or more persons; (3) injury to person or property; and (4) existence of an unlawful act independent of the actual conspiracy. *Universal Coach, Inc., v. New York City Transit Authority Inc.*, 90 Ohio App. 3d 284, 629 N.E. 2d 28 (1993), citing *Minarik v. Nagy*, 8 Ohio App. 2d 194, 193 N.C. 2d 280 (1963). As explained by Plaintiff, the Third Verified Amended Complaint alleges that the Defendants conspired to wrongfully incarcerate and prosecute the Plaintiff, that the means for doing so was issuance of a search warrant upon facts known to be false and the omission of facts which, if disclosed, would have eliminated probable cause. This latter act may be unlawful in itself and Plaintiff alleges that he was harmed thereby in that he was in fact arrested and held.

We have recently been cautioned by the Supreme Court not to construct special pleading requirement when the Civil Rules themselves do not impose such requirement. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. ____, 113 S.Ct. 1160, 122 L. Ed. 2d 517 (1993). Nothing in Fed. R. Civ. P. 8 suggests that particularized pleading of a conspiracy is required. The Ohio pleading cases relied by Defendant Schumaker which were handed down before the Ohio Rules of Civil Procedure were adopted are inapposite.

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term of art in pleading. The Court is, however, completely unaware of what that phrase is supposed to mean.

Insofar as the instant Motion seeks dismissal of the conspiracy claim in the Seventeenth Cause of Action, it is DENIED.

In the second branch of the Motion, Defendant Schumaker seeks dismissal of Plaintiff's claim for civil recovery for a criminal act.

Mr. Ridder claims that Ohio Revised Code §2307.60 creates a cause of action for a person injured by a criminal act. The statute provides:

> Anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law, may recover the costs of maintaining the civil action and attorney's fees if authorized by any provision of the Rules of Civil Procedure or another section of the Revised Code or under the common law of this state, and may recover punitive or exemplary damages if authorized by section 2315.21 or another section of the Revised Code. No record of a conviction, unless obtained by confession in open court, shall be used as evidence in a civil action brought pursuant to this section.

As Plaintiff contends, on its face this statute appears to create a civil cause of action in favor of anyone injured by a criminal act. Nonetheless, the Ohio courts of appeals have uniformly held that the statute is a mere codification of the common law rule in Ohio that a civil action is not merged in a criminal action based on the same facts and does not create a cause of action. *Guardianship of Newcomb v. City of*

Bowling Green, 36 Ohio App. 3d 235, 523 N.E. 2d 354 (1987); *Peterson v. Scott Construction Co.*, 5 Ohio App. 3d 203, 451 N.E. 2d 1236 (1982); *Schmidt v. State Aerial Farm Statistics, Inc.*, 62 Ohio App. 2d 48, 403 N.E. 2d 1026 (1978).

Plaintiff notes that under the *Erie* doctrine, this Court is bound to apply Ohio substantive law as to this pendent claim. Since the Ohio Supreme Court has not yet interpreted Ohio Revised Code §2307.60, Plaintiff suggests the Court must look to the language of the statute itself, and not to the appellate opinions cited by Defendant Schumaker. To the contrary, federal courts normally treat decisions of state courts of appeals on issues of state law as authoritative absent a strong showing that the state's highest court would decide the issue differently. *Puckett v. Tennessee Eastman co.*, 899 F. 2d 1481, 1485 (6th Cir. 1989); *Maseda v. Honda Motor Co., Ltd.*, 861 F.2d 1248, 1256 n. 14 (11th Cir. 1988); *Tippecanoes Beverages v. S.A. El Aguila Brewing Co.*, 833 F.2d 633, 638-39 (7th Cir. 1987). *Laundree v. AMCA*, 908 F.2d 43 (6th Cir. 1990). If the state's highest court has not spoken on an issue, " the federal court must ascertain from all available data what the state law is and apply it." The district court may not ignore what state appellate courts have done unless convinced the highest court would decide otherwise. *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151 (6th Cir. 1981).

The opinion of Judge Swank in *West American Ins. Co v. Carter*, 50 Ohio Misc. 2d 20, 553 N.E. 2d 1099 (1989), though the most recent opinion cited, does not persuade the Court that the Ohio Supreme Court would find §2307.60 creates a civil cause of action, particularly since

Judge Swank does not discuss the history of the statute, as is done in the cases cited by Defendant Schumaker.

As to any claim for civil recovery for a criminal act as attempted to be pleaded in the Seventeenth Cause of Action, Defendant Schumaker's Motion is well taken and is hereby GRANTED. Any and all such claims shall be dismissed with prejudice.

July 27, 1994

/s/
Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN MICHAEL RIDDER:		
Plaintiff(s),	:	Case No. C-3-90-003
-vs-	:	Magistrate Judge Michael R. Merz
CITY OF SPRINGFIELD, OHIO, et al.,		
Defendant(s).		

DECISION AND ORDER GRANTING DEFENDANT CITY OF SPRINGFIELD'S MOTION FOR SUMMARY JUDGMENT

Filed January 11, 1995

This case is before the Court upon Motion for Summary Judgment of Defendant City of Springfield, Ohio (Doc. #226). The Motion was served on December 15, 1994, and filed on December 16th. Under S.D. Ohio L. R. 7.2, the time within which Plaintiff was entitled to file a memorandum in opposition and any other responsive materials expired January 9, 1995. No opposing materials have been filed.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. On a motion for summary judgment, the movant has the burden of showing that there exists no genuine issue of material fact, an the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). Nevertheless, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which were designed to "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)(.

Read together, *Liberty Lobby* and *Celtoex* stand for the proposition that a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. Fed. R. Civ. P. 50). *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). If, after sufficient time for discovery, the opposing party is unable to

demonstrate that he or she can do so under the *Liberty Lobby* criteria, summary judgment is appropriate. *Id.* The opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matusushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50, 106 S. Ct. at 2510-11 (citations omitted). "On summary judgment," moreover, "the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962). Thus, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249, 106 S. Ct. at 2510.

> The moving party
>
> > [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celtoex, 477 U.S. at 323; *see also, Boretti v. Wiscomb*, 930 F. 2d 1150, 1156 (6th Cir. 1991) (citation omitted). In ruling on a motion for summary judgment (in other words, determining whether there is a genuine issue of material fact), "[a] district court is not obligated to wade through and search the entire record for some specific facts that might

support the nonmoving party's claim." *Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990). Thus, in determining whether a genuine issue of material fact exists on a particular issue, a court is entitled to rely only upon those portions of the verified pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

In response to Springfield's Motion for Summary Judgment, Plaintiff has done nothing, either to point out where material questions of fact are created by the record or otherwise. This case has been pending for five years. If after that amount of time Plaintiff has been unable to establish any factual basis for his claim against the City of Springfield, one might reasonably wonder factual support those claims were believed to have when they were first filed. See Fed. R. Civ. P. 11.

Upon the evidence relied upon in the Motion and the authority therein cited, Springfield's Motion for Summary Judgment is GRANTED and all claims made against it in this action are dismissed with prejudice.

January 11, 1995. /s/_____

Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STEVEN MICHAEL RIDDER,

Plaintiff(s), : Case No. C-3-90-003

- vs -

Magistrate Judge Michael R. Merz

CITY OF SPRINGFIELD, OHIO, et al.,

Defendant(s). :

ORDER VACATING DECISION AND ORDER GRANTING DEFENDANT CITY OF SPRINGFIELD'S MOTION FOR SUMMARY JUDGMENT AND EXTENDING PLAINTIFF'S TIME TO RESPOND TO JANUARY 23, 1995

(Filed January 18, 1995)

On Plaintiff's Motion to Reconsider Decision and Order Granting Defendant City of Springfield's Motion for Summary Judgment (Doc. #235), the said Decision and Order (Doc. #234) is VACATED and the time within which Plaintiff may respond thereto as provided in Fed. R. Civ. P. 56 is EXTENDED to and including January 23, 1995.

This Order is made merely to relieve the Plaintiff from the excusable neglect recited in the Motion, to wit, that counsels' support staff calendared the response date, in counsels' absence from the office on vacation, for the same date as the response to all the other summary judgment motions filed in this case, instead of the date applicable to motions filed before December 30, 1994. This Order is not granted on any other basis set forth in Plaintiff's Motion.

Passing by without comment the Plaintiff's counsel's renewed criticism of the Court, the Court notes the statement on page 8 that "Counsel has read pretrial orders and has had no problem in compliance for twenty-one (21) years." In that regard, counsel's attention is respectfully directed to the motion he filed July 8, 1994, (Doc. #211) in which he plead excusable neglect relating to failure to read Fed. R. Civ. P. 26 on expert witness reports as referenced in this Court's Scheduling Order.

IT IS SO ORDERED.

January 19, 1995.

/s/ Michael R.Merz
Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STEVEN MICHAEL RIDDER,

Plaintiff(s), : Case No. C-3-90-003

- vs -

Magistrate Judge Michael R. Merz

CITY OF SPRINGFIELD, OHIO, et al.,

Defendant(s). :

DECISION AND ORDER DENYING PLAINTIFF'S RENEWED MOTION FOR MODIFICATION OF ORDER AND DECISION REGARDING EXPERT WITNESSES

(Filed Jan. 25, 1995)

This case before the Court upon Renewal of Plaintiff's Motion for Modification of Order and Decision; Notice of Filing Expert Reports (Doc. #238).

PROCEDURAL HISTORY REGARDING PLAINTIFF'S EXPERT WITNESSES

After much delay and struggle over the pleadings,[1] this case came on for scheduling conference in open court on February 14, 1994. The dates by which various stages of the litigation would be complete were agreed upon by all counsel and the Court and embodied in a Scheduling Order (Doc. #170). Pertinent to the instant Motion is ¶5 which provides "Date to exchange lists of expert witnesses and furnish copies of expert reports to opposing counsel and the Court — Plaintiff - May 15, 1994." This paragraph is footnoted with the language "The expert reports required by this Order shall comply with Fed. R. Civ. P. 26(a)(2)(as amended December 1, 1993)." Further highlighting the importance of expert reports, the Order provides on page 2:

> The attention of counsel is called to amendments to the Federal Rules of Civil Procedure which became effective December 1, 1993, particularly with

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1 This delay was caused largely by the conflict between the general notice pleading regime of the Federal Rules and the detailed pleading necessary to adjudicate immunity defenses before discovery. Compare *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. ___, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993), with *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); *Dominique v. Teleb*, 831 F. 2d 673 (6th Cir. 1987); *Poe v. Hayden*, 853 F. 2d 418 (6th Cir. 1988), *cert. denied*, 488 U.S> 1007 (1989). This Court eventually held in this case that *Leatherman* does not affect the pleading requirements as to the qualified immunity issue. *Ridder v. Springfield*, Order Denying Defendant Lawrence's Motion for Judgment on the Pleadings, C-3-90-003 (S.D. Ohio 10/18/93). However, the Court must also accept responsibility for taking too long to rule on the various motions to dismiss and again apologizes to the parties for the delay.

> respects to expert reports and the exchange of witness lists and trial exhibits.

On May 16, 1994, Plaintiff filed his Notice of Provision of Reports of Plaintiff's Expert Witnesses (Doc. #181) which lists Robert E. Berry, Dr. Joseph Paley, Dr. Ramchandra Ramnath, Dr. G. James Sammarco, Dr. Arthur Schramm, Barry Duncan, Dr. Peter Barre, Dr. David Kaehr, each individual Defendant, Ron Morris, Terry Lewis, Larry Gregor [sic], Jan Spitler, Kelly Malcolm, and Dick Emmons as intended expert witnesses. The Notice represents that the reports of Berry, Paley, Ramnath, Sammarco, Duncan, Barre, Kaehr, and Emmons had already been forwarded when received by Plaintiff. No copies of the already furnished reports were filed.

The next day the Court pointed out the deficiencies in the May 16th filing in its Order regarding Plaintiff's Notice of Provision of Reports of Plaintiff's Expert Witnesses (Doc. # 182). The Order then concluded:

> In accordance with the foregoing findings, it is hereby ORDERED:
>
> 1. Plaintiff shall file the reports of Robert E. Berry, Joseph Paley, Ramchandra Ramnath, G. James Sammarco, Barry Duncan, Peter Barre, and David Kaehr with the Court not later than May 23, 1994. Reports which do not conform to Fed. R. Civ. P. 26(a)(2) will be stricken and the witnesses with which they are associated will not be permitted to testify;
>
> 2. Drs. Barre and Kaehr will not be permitted to testify to any matter proposed to be shown by any

supplemental report unless a) the supplemental report is filed and served not later than May 30, 1994, and b) Plaintiff shows good cause for failing to supplement the prior reports by the time required by the Scheduling Order;

3. Not later than May 23, 1994, Plaintiff shall file a statement of what expert testimony he expects to elicit from each of the Defendants;

4. Not later than May 30, 1994, Plaintiff shall file an expert report from Ron Morris; and

5. Proposed experts Arthur Schramm, Terry Lewis, Larry Greger, Jan Spitler, Kelly Malcolm, and Dick Emmons are STRICKEN from Plaintiff's expert witness list and precluded from testifying herein.

Plaintiff's Notice fails to comply with Fed. R. Civ. P. 26(a)(2) with respect to each and every witness listed. With respect to six out of fourteen (not counting the Defendants), Plaintiff avers that no report is yet available, although this case is four and one-half years old. The Court advised the parties in February, 1994, that it would adhere rigorously to the schedule adopted, which allowed an entire additional year to prepare for trial, despite the fact the case was then over a year old. The Court intends to adhere to that advice and the adopted schedule.

(Doc. #182, pp. 2-3)

On May 23, 1994, Plaintiff filed his Motion to Allow Richard Emmons to Serve as an Expert Witness (Doc. #184), pointing out that Mr. Emmons' report (attached as Exhibit 3 to the Motion) had in fact been provided to Defendants and filed with the Court on March 28, 1991, in

support of Plaintiff's Motion for Summary Judgment. On the same day, Plaintiff filed the reports of Messrs. Berry and Duncan and Drs. Paley, Ramnath, Sammarco, Barre, and Kaehr (Doc. #183). On may 31, 1994, Plaintiff filed a supplemental report of Dr. Peter Barre (Doc. #185).

The Court dealt with these supplemental filings in an Order of June 2, 1994 (Doc. #196), which struck the reports of Messrs. Berry and Duncan and Drs. Paley, Ramnath, Sammarco, Barre, and Kaehr for noncompliance with Fed. R. Civ. P. 26(a)(2), struck Ron Morris as a witness because no report at all had been furnished, found that good cause had not been shown for the delay in naming Dr. Barre as an expert, and denied the Motion to add Mr. Emmons without prejudice to its renewal if his report was supplemented to conform to Fed. R. Civ. P. 26(a)(2).

On July 8, 1994, Plaintiff filed a Motion for Modification of Order and Decision (Doc. #211) requesting an additional thirty days to comply with Fed. R. Civ. P. 26(a)(2). The Motion asserted that counsel's failure to comply with that rule was the result of excusable neglect and that it was not feasible or just to apply 26(a)(2) to this case which was pending when it was adopted. Regarding impact on the Defendants, Plaintiff's counsel wrote:

> If Plaintiff's request is granted, there will be no resulting prejudice to the opposing parties. To date, there had [sic] been no scheduled depositions of any experts, either Plaintiff's or Defendants'. In addition, Defendants have known, either through informal or formal discovery, not only the identity of most if not all of Plaintiff's anticipated experts, but their opinions and the basis therefore as well.

> Clearly, these depositions can still be scheduled and taken without delaying this matter any further., As a reminder, the deadline within which to have all depositions taken of the expert witnesses is not until November 1, 1994. The deadline would not even have to be extended if Plaintiff is granted additional time.

(Doc. #211, p. 4). This Motion was filed on Friday, July 8. On Monday, July 11, the Court denied the Motion without prejudice to its renewal if accompanied by (1) an actual showing of excusable neglect (as compared with a mere claim) and (2) reports which complied with Fed. R. Civ. P. 26(a)(2). Nothing further was filed by Plaintiff respecting expert witnesses until he filed the instant Motion on January 23, 1995, 6 1/2 months later.

THE INSTANT MOTION

The instant Motion purports to respond to the Court's July 11, 1994, invitation by providing explanations of the excusable neglect and providing reports of Messrs. Duncan, Berry, and Emmons and Dr. Paley which are said to comply with Fed. R. Civ. P. 26(a)(2).

As grounds of excusable neglect, counsel asserts he was unaware of the revised provisions of Fed. R. Civ. P. 26(a)(2) until the Court's Order of June 2, 1994, because (1) he had not adverted to the Rule when he read the Scheduling Order in February and (2) this was the first case in which the Rule was applicable to him, expert reports having already been filed in his previously pending federal cases.

Ignorance of the law excuses no man, much less a lawyer.[2] The Civil Rules were amended as of December 1, 1993, after a good deal of public and Congressional debate and bar attention. Any federal practitioner should have known since he frequently appears in this Court as trial attorney in civil matters; in fact, in more than two dozen cases filed since January 1, 1990.

Nevertheless, the Court understood that the 1993 amendments would somewhat change practice for many attorneys, particularly with respect to expert witnesses. That is why the Court inserted not one but two references to the change in its standard scheduling order, the language quoted above.

Counsel says he didn't know the law had changed and he didn't read the Court Order that should have alerted him to the law change. If this were accepted as excusable neglect as of May 16, 1994, it could hardly be accepted as of May 17, 1994, when the Court pointed out to counsel that the reports actually filed did not comply with Rule 26. In effect the Court treated Plaintiff's counsel's failure to comply at that point as excusable neglect because counsel was *sua sponte* given time to correct the deficiencies

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2 This law is so well settled that Blackstone expressed it in Latin: "Ignorantia juris, quod quisque scire tenetur, neminem excusat" — ignorance of the law, which every man is presumed to know, does not afford excuse. 4 Blackstone's Commentaries 27. Unfamiliarity with the Rules of Civil Procedure does not constitute excusable neglect. 4A Wright and Miller, Federal Practice and Procedure: Civil 2d §1165, *citing Marane, Inc. v. McDonald's Corp.*, 755 F. 2d 106 (7th Cir. 1985); *Driver v. Gendy Mfg. Corp.*, 24 F.R.D. 473 (D. Pa. 1959).

(See Doc. #182). When that time expired at the end of May, none of the reports had been brought into compliance (see Doc. #196) and the Court only then struck the listed witnesses.

On July 8 Plaintiff asked for an additional thirty days to comply with the Rule, representing that he would be able to provide complying reports by August 7, 1994. The Court denied the request without prejudice to its renewal actual excusable neglect would be shown and complying reports filed. Had the instant Motion been filed by August 7, 1994, it would undoubtedly have been granted, assuming the reports complied. As of that date there would have been nearly ninety days left for Defendants to depose the proposed experts before the November 1 discovery cut-off.

However, the Motion was not filed until January 23, 1995, almost ninety days after the discovery cut-off, and 6 1/2 months after counsel asked for thirty days. So far as the Court can tell from the docket, none of Plaintiff's proposed expert witnesses has been deposed; at least no notices or transcripts of their depositions have been filed. Moreover, Defendants have filed summary judgment motions in accordance with the schedule agreed upon by Plaintiff, with no notice Plaintiff would later seek a change, and in reliance upon the fact that discovery was complete. Plaintiff cannot pretend that Defendants would not be prejudiced by permitting this late identification of undeposed expert witnesses and the instant Motion makes no such claim.

Why has Plaintiff waited until now to file the reports and affidavits of excusable neglect? Because,

counsel says, of the lack of cooperation of witnesses: Dr. Kaehr refuses to participate, Drs. Barre and Sammarco have failed to cooperate, and Dr. Ramnath had been too ill to examine Plaintiff, a necessary prerequisite to his making a complying report. These are certainly good reasons why these four doctors will not be expert witnesses at the trial of this case, and Plaintiff no longer proposes to call them.[3]

Plaintiff does still propose to call Messrs. Berry, Emmons, and Duncan and Dr. Paley.

Mr. Duncan has supplemented his October 31, 1990, report with his curriculum vitae, his hourly rate, a reference to Mr. Ridder's medical records, and, as a list of cases in which he has testified, "BANKS and several others (at least 4 others) that I cannot recall names."

Dr. Paley has supplemented his April 25, 1991, report by saying he relies on examinations does April 25, 1991, and September 2, 1992, and the medical records on file, by referencing his curriculum vitae, by disclosing his hourly rate of $600, and by disclosing that he has authored nothing in the last ten years and cannot recall what cases he has testified in.

Mr. Emmons has supplemented his March 27, 1991, report with his curriculum vitae, his rate of compensation, and reference to the one other case in which he has testified.

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[3] Counsel states that "It is still believed that Dr. Ramnath could be available," but no parameters on that availability are suggested, such as when he could do the examination, when his reports would be ready, and when he could be deposed.

Mr. Berry has supplemented his May 14, 1994, report with the United States Life Tables, pages from Economic Reports of the President (1992 & 1994), several economics articles, his curriculum vitae, a letter from Mr. Brannon's associate providing data for economic assumptions in the report, his fee, and a list (dated August 10, 1994) of cases in which he has testified.

None of this information supplied in these supplemental reports could have taken any of these witnesses more than an hour to prepare, except perhaps Mr. Berry's which might have taken a day. Three of the supplements are undated; Mr. Berry's was prepared August 10, 1994. Why, then, did Plaintiff's counsel delay until January 23, 1995,[4] to file them? The Memorandum claims:

> The reasons Plaintiff has not filed these reports previously are many. First and foremost, Plaintiff has still not received the requested information from all of the experts Plaintiff intended to use. Currently being faced with responding to Motions for Summary Judgment from all Defendants, Plaintiff is forced to proceed without the benefit of many of the intended experts because not all of the reports are in a position to comply with the rule and Plaintiff needs to rely upon these reports in order to respond to the Motions for Summary Judgment. **Plaintiff's understanding was that all reports need to be filed at the same time as the Motion.**

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4 196 days after leave was granted, 84 days after the discovery cut-off, 24 days after summary judgment motions were filed, and only 42 days before trial.

(Doc. #238, p. 4). The highlighted sentence is plainly disingenuous. Why would counsel think that the lack of cooperation of several proposed expert witnesses would justify withholding supplemental reports of other expert witnesses until more than five months after they were prepared (at least in Mr. Berry's case, and his supplement is the most thorough) and nearly three months after the discovery cut-off. In making the initial ruling on Plaintiff's expert witness list, the Court wrote:

> The Court advised the parties in February, 1994, that it would adhere rigorously to the schedule adopted, which allowed an entire additional year to prepare for trial, despite the fact the case was then over a year old. The Court intends to adhere to that advice and the adopted schedule.

It is now over eight months since that was written.

Assuming that there was excusable neglect on Plaintiff's counsel's part as of May 17, 1994, or even as of July 8, 1994, no excusable neglect has been demonstrate for the six months since then, particularly in light of the discovery cut-off and the summary judgment motions.

Plaintiff raises several other points which require discussion.

Plaintiff's counsel characterizes Fed. R. Civ. P. 26(a)(2) as "rigorous and unworkable." Briefly, the Rule was adopted unanimously by the United States Supreme Court, not this Court.

Plaintiff's counsel argues it is unjust to require compliance with the amended rule because this case was filed prior to the rule's effective date. Although the cases filed in January, 1990, it was still in the pleading stage when the amendment became effective December 1, 1993. Furthermore, the rule merely codified what had been generally the practice of this Court for many years to require expert reports. (See, e.g., District Judge Rice's Amended General Order No. 1, effective 1/1/89; see also Doc. #13, the original Scheduling Order in this Case[5]).

Amendments to the Federal Rules of Civil Procedure are routinely made applicable to pending cases. See Fed. R. Civ. P. 86 and orders of the Supreme Court adopting amendments subsequent to 1970. There is no injustice in applying this amendment here where it only expands somewhat on the Court's prior practice, where discovery has not yet commenced when it was adopted, and where the parties were given ample notice of its applicability. Nor has Plaintiff shown how "the new requirements require considerably greater effort for compliance," especially in light of the very cursory supplemental reports prepared by the four expert witnesses still proposed.

Plaintiff requests that if the Court will not allow Mr. Emmons to testify as an expert, he be permitted to testify as a fact witness. However, he was never identified

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5 That Order, filed March 16, 1990, provides in relevant part "Not later than August 1, 1990, Plaintiff shall disclose to Defendant and file with the Court the identity and addresses of his intended expert at trial witnesses and shall furnish Defendants with copies of said experts' reports."

as a lay witness and it is far too late to do so, since discovery is long since closed.

Plaintiff's counsel offers "It is my legal opinion that any interpretations of Fed. R. Civ. P. 26(a)(2) to apply to treating physicians is erroneous." The Court agrees that the rule was not intended to apply to treating physicians so long as they do not purport to testify beyond the scope of their own diagnosis and treatment of a party. See Advisory Committee Note to Fed. R. Civ. P. 26(a)(2). However, if they propose to testify to other issues, they are subject to the same rule.

Finally, Plaintiff's counsel states "In the alternative, counsel moves the Court for a continuance of the trial date, either instructing the Plaintiff to obtain new counsel or allowing present counsel to continue on the case." The Court has addressed Plaintiff's continuance and substitution of counsel requests in a separate order, responding to a separate motion [sic]

Plaintiff has not demonstrate any excusable neglect in his failure to furnish expert reports of Messrs. Berry, Duncan, and Emmons and of Dr. Paley from August, 1994, to January 23, 1995. The renewed Motion for Modification of Order and Decision on expert witnesses is DENIED.

January 25, 1995.

/s/ Michael R.Merz
Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DYTON

STEPHEN M. RIDDER,	:	
Plaintiff(s),	:	Case No. C-3-90-003
vs.	:	Magistrate Judge Michael R. Merz
CITY OF SPRINGFIELD, OHIO, et al.,	:	
Defendant(s)	:	

ORDER REGARDING PLAINTIFF'S "MOTION FOR RELIEF IN THE ALTERNATIVE OR CUMULATIVE TO PLAINTIFF'S MOTION FOR RENEWAL OF PLAINTIFF'S MOTION FOR MODIFICATION OF ORDER AND DECISION, ET AL."

Filed January 25, 1995

This case is before the Court upon Plaintiff's "Motion for Relief in the Alternative or Cumulative to Plaintiff's Motion for Renewal of Plaintiff's Motion for Modification of Order and Decision, et al." (Doc. #239).

The Motion seeks relief in nine separately numbered branches and then requests an additional seven days "to fully develop these motions." The Court agrees that some of the

motions need additional development, although some of them are ripe for decision now.

Contemporaneously with this Order, the Court has ruled on Plaintiff's "Motion for Modification of Order and Decision" regarding expert witnesses (Doc. #238). Based on the reasoning set forth in that Decision, Branches 1, 2, 3, and 4 of the instant Motion are denied.

In Branch 5, Plaintiff asks for an indefinite trial continuance to obtain compliance with Fed. R. Civ. P. 26(a)(2) by ninety days before the trial date. When this case was scheduled in February, 1994, the parties prepared a joint discovery plan which contemplated completion of expert discovery in a timely fashion so as to permit trial in March, 1995, as presently scheduled. In considering any motion for continuance, the Court would need to know why that did not work and what Plaintiff's counsel believes needs to be done to comply with Fed. R. Civ. P. 26(a)(2) which he believes could be accomplished; the Motion for Modification reports that most of Plaintiff's projected expert medical witnesses have refused or failed to cooperate.

In Branch 6, Plaintiff asks for permission to dismiss without prejudice with refiling allowed for one year and obviously with trial at some time after that. Given the current state of the docket and assuming refiling were delayed for the full year, that would delay the trial of this case until more than seven years after the incidents in question. The Court needs to know the same information as with respect to Branch 5, as well as Defendants reaction and what conditions they would propose and would be just on dismissal and re-filing.

In Branch 7, Plaintiff asks to be allowed to substitute counsel, but no suggestion is made that there is substitute counsel available to pursue the case.

In Branch 8, Plaintiff requests bifurcation of the claims against Dr. Lawrence, as he had previously requested and Plaintiff had opposed, but with dismissal and re-filing in the state courts. Again, the Court needs Defendants' reactions.

Accordingly, Plaintiff is GRANTED until January 30, 1995, to fully develop Branches 5 through 9 of the Motion, particularly in the ways outlined above. Branches 1 through 4 are DENIED.

January 25, 1995 /s/_____

Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DYTON

STEPHEN M. RIDDER,	:	
Plaintiff(s),	:	Case No. C-3-90-003
vs.	:	Magistrate Judge Michael R. Merz
CITY OF SPRINGFIELD, OHIO, et al.,	:	
Defendant(s)	:	

SECOND ORDER REGARDING PLAINTIFF'S "MOTION FOR RELIEF IN THE ALTERNATIVE OR CUMULATIVE TO PLAINTIFF'S MOTION FOR RENEWAL OF PLAINTIFF'S MOTION FOR MODIFICATION OF ORDER AND DECISION, ET AL."

Filed January 31, 1995

This case is before the Court upon Plaintiff's "Motion for Relief in the Alternative or Cumulative to Plaintiff's Motion for Renewal of Plaintiff's Motion for Modification of Order and Decision, et al." (Doc. #239) as supplemented by Plaintiff's "Memorandum in Support of Plaintiff's Motion of January 25, 1993 [sic], and Motion for Leave for Reconsideration of All Plaintiff's Prior Memorandums Seeking Relief (Doc. #251).

The first Motion sought relief in nine separately numbered branches and then requested an additional seven days "to fully develop these motions." On January 25, 1995, the Court denied Branches 1, 2, 3, and 4 and granted Plaintiff time to more fully develop Branches 5, 6, 7, 8, and 9, which Plaintiff has done in the instant Memorandum and Motion.

In Branch 5, Plaintiff asks for an indefinite trial continuance to obtain compliance with Fed. R. Civ. P. 26(a)(2) by ninety days before the trial date. In the January 25th Order, the Court said it "would need to know why [the February, 1994, Scheduling Order plan for completing expert discovery] did not work and what Plaintiff's counsel believes needs to be done to comply with Fed. R. Civ. P. 26(a)(2) which he believes could be accomplished..." Plaintiff's counsel has not responded to the first question. As to remedial measures, he proposes:

1. He would personally immediately go to the office of each expert to obtain the necessary information.

2. If that did not work, he would depose these experts, preferably without Defendants present or , if present, permitted only to examine on the issues of compliance with Fed.R.Civ.P. 26(a)(2).

3. Alternatively, the experts could be deposed under Fed.R.Civ.P. 27 or 31.

Although he had initially requested a trial continuance with respect to Branch 5, Plaintiff's counsel now says no continuance would be necessary.

As to individual proposed experts, Plaintiff says as follows:

1. Counsel now avers that **Dr. Ramnath** could see Plaintiff on a limited basis in his home.

2. **Dr. Paley** is said to be unable to comply with Fed.R.Civ.P. 26(a)(2) because of the great number of cases in which he testifies; in any event he is said to be well known to defense counsel. Dr. Paley is said to be the only expert who is absolutely necessary to the case.

3. Nothing new is presented on **Mr. Berry** (referred to as "Dr. Berry" in the Motion).

4. **Messrs. Morris, Lewis, and Greger** are said not to be absolutely necessary to the case, but apparently Plaintiff would still like to present Mr. Greger on the issue of deliberate indifference to serious medical need. Mr. Greger would testify in response to a hypothetical question on the basis of evidence made known to him at trial. [Presumably this means that the evidence which will form the basis of the hypothetical question has not yet been made known to Mr. Greger.]

5. Concerning **Mr. Emmons**, it is said that there is no prejudice in his use as an expert because the Court has used his report and all defense counsel have had it since early in the case. In any event, it is said the Court should allow him to testify as a fact witness or an impeachment witness.

In Branch 6, Plaintiff asked for permission to dismiss without prejudice with refiling allowed for one year and obviously with trial at some time after that. As to that suggestion, the Court asked for the same information as was requested on Branch 5 as well as defendants' reactions. In response, Plaintiff avers there would be no prejudice in that the current rulings would be preserved by collateral estoppel and/or *res judicata*..[1] Plaintiff asserts that no Defendant would be prejudiced.

In Branch 7, Plaintiff asked to be allowed to substitute counsel, but no suggestion was made that there is substitute counsel available to pursue the case. In response, counsel suggests that Mr. Lopez could continue to litigate the case.

In Branch 8, Plaintiff requests bifurcation of the claims against Dr. Lawrence, as he had previously requested and Plaintiff had opposed, but with dismissal and re-filing in the state courts. In the January 25th Order, the Court indicated it needed Defendants' reactions; none have been offered in the instant Memorandum.

Plaintiff avers that Defendants would not be prejudiced by any of the relief sought. He particularly complains that the Court has acted with respect to his expert witnesses *sua sponte* and that no Defendant has concurred in the Court's actions. Two points are important.

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1 It is the Court's understanding that these doctrines apply only to issues determined by judgments on the merits. Of course, the parties could agree to be bound by the rulings already made.

First of all, the Court is perfectly willing to grant any of the relief requested by Plaintiff if the Defendants concur.[2] This case has already been repeatedly reported to the Sixth Circuit and the public as an over-three-year-old case. If it is necessary to continue to do so for another one or two years in order to do substantial justice and the Defendants agree, the Court will not obstruct that result.

Secondly, no one should infer animus against Plaintiff or his counsel from the Court's *sua sponte* enforcement of its own Scheduling Order. As a judge I have always believed that a court must stand behind the orders it makes because the parties and the public have a right to rely on them.

In light of Plaintiff's characterization of the Court's prior decisions on the matter of expert witnesses as advocacy for the Defendants, the Court will make no further comment on the instant Motion and Memorandum until Defendants have responded. In light of the pendency of motions for summary judgment and the imminence of the trial date, **Defendants shall respond to the instant Motion**

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2 Because of this ruling, the Court will not discuss ant potential prejudice to Defendants from any of the proposed avenues of relief. Plaintiff has essentially challenged Defendants to come forward if they believe they would be prejudiced by any of the relief requested and has characterized the Court's behavior as advocacy for the Defendants. Given the state of the record, the burden is on Defendants to in fact set ofrth [sic] their positions.

and its requests for various forms of relief not later than February 6, 1995.

January 31, 1995

/s/_____
Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

STEPHEN M. RIDDER,

Plaintiff(s), : Case No. C-3-90-003

-vs-

Magistrate Judge Michael R. Merz

CITY OF SPRINGFIELD, OHIO, et al.,

defendant(s). :

THIRD ORDER REGARDING PLAINTIFF'S "MOTION FOR RELIEF IN THE ALTERNATIVE OR CUMULATIVE TO PLAINTIFF'S MOTION FOR RENEWAL OF PLAINTIFF'S MOTION FOR MODIFICATION OF ORDER AND DECISION, ET AL."

Filed February 8, 1995

This case is before the Court upon Plaintiff's "Motion for Relief in the Alternative or Cumulative to Plaintiff's Motion for Renewal of Plaintiff's Motion for Modification of Order and Decision, et al." (Doc. #239) as supplemented by Plaintiff's "Memorandum in Support of Plaintiff's Motion of January 25, 1993, and Motion for Leave for Reconsideration of All Plaintiff's Prior Memorandums Seeking Relief (Doc #251). In response to the Court's Second Order on this Motion (Doc. #252),

Defendants have stated their positions (Doc. ##254, 256, 257).

This first Motion sought relief in nine separately numbered branches and then requested an additional seven days "to fully develop these motion." On January 25, 1995, the Court denied Branches 1, 2, 3, and 4 and granted Plaintiff time to more fully develop Branches 5, 6, 7, 8, and 9, which Plaintiff has done in the instant Memorandum and Motion.

Nothing presented by Defendants requires deletion of any finding or observations made in the first two Orders related to this Motion and they are incorporated herein by reference.

In Branch 5, Plaintiff asks for an indefinite trial continuance to obtain compliance with Fed. R. Civ. P. 26(a)(2) by ninety days before the trial date. In Branch 6, Plaintiff asked for permission to dismiss without prejudice with refiling allowed for one year and obviously with trial at some time after that, asserting that no Defendant would be prejudiced. In Branch 7, Plaintiff asked to be allowed to substitute counsel. In Branch 8, Plaintiff requests bifurcation of the claims against Dr. Lawrence, as he had previously requested and Plaintiff had opposed, but with dismissal and re-filing in the state courts. Branch 9 merely asks for whatever further or alternative relief the Court may find necessary.

In his Supplemental Memorandum, Plaintiff asserted that Defendants would not be prejudiced by any of the relief sought and complained that the Court had acted with respect

to his expert witnesses *sua sponte* and that no Defendant has concurred in the Court's actions. In response (Second Order, Doc. #252), The Court indicated it was '**perfectly willing to grant any of the relief requested by Plaintiff if the Defendants concur.**" None of the Defendants has concurred in any of the relief requested by Plaintiff. All assert various forms of actual or potential prejudice: possible loss of witnesses or further dimming of memories (particularly if the case is dismissed and re-filed), additional expense from the reopening of discovery, waste of the substantial effort and expense already invested in the pending summary judgment motions. Defendants point out that they deposed none of the persons Plaintiff identified as expert witnesses because they had been stricken. Obviously if the Court now allowed these witnesses back into the case, it would have to allow Defendants time to depose them. That simply could not be done in the twenty-five days remaining until the trial; thus Plaintiff's suggestion that his expert witness list could be reopened without continuing the trial date is simply unrealistic.[3]

The Court has employed the sanction of excluding witnesses only as a last resort. When Plaintiff first failed to comply, the Court *sua sponte* allowed additional time within which to do so. Plaintiff failed to comply by the second deadline at the end of May, but as late July 11 the Court indicated its willingness to reconsider the exclusion if Plaintiff would actually file the required reports. It was only

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[3] The Court notes that some of Plaintiff's treating physicians are hostile and would apprarently have to be subpoenaed.

six months later, after discovery cut-off and summary judgment motions were filed, only six weeks before trial that Plaintiff attempted to comply and then with supplemental reports which had apparently been in Plaintiff's hands since August, 1994.[4] As several Defendants note, Fed. R. Civ. P. 37 requires the exclusion of expert witnesses who are not properly disclosed unless there was substantial justification and the failure was harmless. Neither exception applies here.

Plaintiff's Motion for Relief with respect to expert witnesses is DENIED in its entirety.

February 8, 1995

/s/
Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

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[4] With respect to one witness, Dr. Joseph Paley, Plaintiff says he is unable to disclose the prior cases in which he has testified because there are so many (Supplemental Report attached to Doc. #238). The same witness is charging $600 per hour to study documents and testify in this case and presumably charges the same rate for other case (*Id.*) This Court has serious difficulty understanding why it is unfair or unworkable to apply Fed. R. Civ. P. 26(a))(2) to an expert witness who has so much work at $600 an hour that he coannot keep records of it.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN MICHAEL RIDDER:		
Plaintiff(s),	:	Case No. C-3-90-003
-vs-	:	Magistrate Judge Michael R. Merz
CITY OF SPRINGFIELD, OHIO, et al.,	:	
Defendant(s).	:	

DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO STRIKE AND FOR SUMMARY JUDGMENT

Filed February 28, 1995

This case is before the Court upon Motion for Summary Judgment of Defendant City of Springfield, Ohio ("Springfield") (Doc. #226); Motion for Summary Judgment of Defendants Robert Kerr, Roger Evans, Ronald Menda , and Robert Marcum (Doc. #228); Motion for Summary Judgment of Defendant Stephen Schumaker (Doc. ##229, 233); Motion of Defendants Sheriff Gene A. Kelly and Clark County, Ohio, for Summary Judgment (Doc. #232); and separate Motions to Strike materials presented by Plaintiff in opposition to summary judgment motions, presented by Defendants Kelly and Clark County (Doc. #258) and Dr. Lawrence (Doc. #265).

Plaintiff has filed Memoranda in Opposition to the Motions for Summary Judgment (Doc. ##240, 241, 232, 243, 244), but not to the Motions to Strike. The Defendants have filed supporting Reply Memoranda (Doc. #253, 255, 260, 262, 263).

These summary judgment motions were timely filed after the conclusion of discovery in the case and in accordance with the schedule proposed by the parties and adopted by the Court in February, 1994 (Doc. #170).

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. On a motion for summary judgment, the movant has the burden of showing that there exists no genuine issue of material fact, and the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Adickes v.. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). Nevertheless, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to "secure the

just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. Fed. R. Civ. P. 50). *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). If, after sufficient time for discovery, the opposing party is unable to demonstrate that he or she can do so under the *Liberty Lobby* criteria, summary judgment is appropriate. *Id.* The opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matusushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50, 106 S. Ct. at 2510-11 (citations omitted). "On summary judgment," moreover, "the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.C. 993, 994, 8 L. Ed. 2d 176 (1962). Thus, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. at 2510.

The moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings,

> depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323; *see also, Boretti v. Wiscomb*, 930 F. 2d 1150, 1156 (6th Cir., 1991) (citation omitted). In ruling on a motion for summary judgment (in other words, determining whether there is a genuine issue of material fact), "a district court is not ... obligated to wade though and search the entire record for some specific facts that might support the nonmoving party's claim." *Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied*, 494 US. 1091 (1990). Thus, in determining whether a genuine issue of material fact exists on a particular issue, a court is entitled to rely only upon those portions of the verified pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

The facts set forth in this Decision are admitted or established by evidence competent under Fed. R. Civ. P. 56(e) and not controverted by opposing competent evidence.

MOTIONS TO STRIKE

Defendants Kelly, Clark County, and Dr. Lawrence have moved (Doc. ##258, 265) to strike certain materials proffered by Plaintiff in opposition to the summary judgment motions, to wit, letters written by Doctors Paley and Ramnath and certain deposition testimony of the Plaintiff.

The Court has dealt separately and at length with the exclusion of Drs. Paley and Ramnath as expert witnesses for

trial, the upshort of which has been their exclusion for failure to provide timely reports comply with Fed. R. Civ. P. 26(a)(2) (See Doc. #246). However, even if these two doctors had been completely qualified as expert witnesses, their letters which have been used as exhibits[1] in opposition to the summary judgment motions would have been stricken because they do not comply with Fed. R Civ. P. 56(e) in that they are not sworn.

Mr. Ridder's own testimony, which is relied upon both to establish a serious medical need and medical malpractice, is incompetent for another reason: it purports to state medical conclusions on which Mr. Ridder is not competent to testify. The medical facts which he recites are not facts within the competence of a lay witness.

Plaintiff has offered no rebuttal to these arguments. The Motions to Strike (Doc. #258, 265) are GRANTED.

THE SUMMARY JUDGMENT MOTIONS

Discovery and trial preparation in this action have proceeded on the basis of Plaintiff's Third Amended Verified Complaint (Doc. #143), filed august 17, 1993. The Scheduling Order for trial preparation was entered in February, 1994, after the Court denied Dr. Lawrence's Motion for Judgment on the Pleadings (Doc. #158) and granted in part and denied in part Defendant Schumaker's prior Motion for Summary Judgment (Doc. #166). Much of

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[1] Dr. Paley's April 25, 1991, letter is Exhibit 3 to Doc. #244; Dr. Ramnath's July 3, 1992, letter is Exhibit 4 to Doc. #244.

the reasoning and authority in the latter Decision applies to the instant motions, and it is incorporated by reference.

The Third Amended Verified Complaint contains nineteen causes of action. They are dealt with here separately as to whether they are federal or state claims.

CLAIMS UNDER FEDERAL LAW: 42 U.S.C. § 1983 AND § 1985

CLAIMS AGAINST POLITICAL SUBDIVISIONS

Plaintiff seeks to recover under 42 U.S.C. § 1983 from the City of Springfield, Clark County, and Sheriff Gene Kelly in his official capacity for the alleged deprivations of his constitutional rights effected by Springfield's police officer Defendants, Marcum, Menda, Kerr, and Evans and for Dr. Lawrence's alleged deliberate indifference to Mr. Ridder's serious medical needs.

Municipalities and other bodies of local government are "persons" within the meaning of § 1983 and may therefore be sued directly if they are alleged to have caused a constitutional tort through a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L.Ed. 2d 611 (1978). An unconstitutional governmental policy can be inferred from a single decision by the highest officials responsible for setting policy in a particular area of the government's business. *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct.

1292, 89 L. Ed. 2d 452 (1986). On the other hand, official policy cannot be inferred from the single unauthorized act of a subordinate government agent, e.g, an unauthorized shooting by a police officer. *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 86 L. Ed. 2d 791 (1985). Only municipal officials with final policymaking authority can subject the municipality to liability. *Pembaur, supra.* whether a particular official has final policymaking authority is a question of state law. *Pembaur, supra; St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988); *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2701, 105 L. Ed. 2d 589 (1989). Identification of the official whose decisions represent the official policy of a particular local government unit is a question of law to be decided by the judge. *Jett*, 491 U.S. at 737.

Even assuming Mendah [sic], Marcum, Kerr, Evans, or Lawrence deprived Mr. Ridder of any constitutional right, Plaintiff has offered no evidence that it was pursuant to any policy, custom, or usage of either the City of Springfield or Clark County. Plaintiff admitted in answers to interrogatories that he was not relying on any written policy, and there is no evidence that the conduct of any of the individual Defendants toward Mr. Ridder was part even of any pattern of conduct which applied to any other person, much less that any such pattern amounted to a policy, custom, or usage.

Accordingly, the § 1983 claims against the City of Springfield, Clark County, and Sheriff Kelly in his official capacity are DISMISSED WITH PREJUDICE.

CLAIMS AGAINST SUPERVISORS

Plaintiff also seeks to recover under 42 U.S.C. § 1983 from Sheriff Kelly and Police Chief Evans as supervisors of the individual Defendants who allegedly deprived him of his constitutional rights.

In order for a supervisor to be liable for constitutional deprivations effected by a subordinate, " . . . there must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a . . . plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Alioto v. City of Shively*, 835 F. 2d 1173 (6th Cir. Cir.[sic] 1987). A supervisory employee cannot be held liable under § 1983 for the constitutional torts of those he supervises unless it is shown "that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it." *Searcy v. City of Dayton*, 38 F.3d 282 (6th Cir. 1994), quoting *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.), *cert. denied*, 469 U.S. 845 (1984). A superior is not liable unless he is "somehow personally at fault by actively participating in, encouraging or directing the commission of illegal acts by his subordinates." *Coffy v. Multi-County Narcotics Bureau*, 600 F. 2d 570 (6th Cir. 1979); *Monell v Department of Social Services*, 436 U.S. 658 (1978); *Jones v. Denton*, 527 F. Supp. 106 (S.D. Ohio 1981). For example, respondeat superior liability is not available in a medical treatment case as to warden and director of department of corrections. *Jones v. Denton*, 537 F. Supp.. 106 (S.D. Ohio 1981).

Plaintiff has presented no evidence of personal involvement of any sort by Sheriff Kelly or Chief Evans with his case and thus the § 1983 claims against them are DISMISSED WITH PREJUDICE.

Plaintiff's argument that Sheriff Kelly is personally liable because he did not supervise Dr. Lawrence is unavailing. Faced with a duty to provide medical care to jail inmates, Sheriff Kelly did precisely what was appropriate. He established a policy of conforming with the Ohio Minimum Guidelines for medical care and then contracted with a medical doctor to provide that care. It would be completely inappropriate for a law enforcement officer to supervise a medical doctor in the sense of second guessing his medical judgments, but that seems to be what Plaintiff suggests Sheriff Kelly should have done. His failure to do so did not violate any constitutional right of Mr. Ridder.

CLAIMS AGAINST DEFENDANT SCHUMAKER

The sole remaining federal claim against Defendant Schumaker is under § 1983 for bringing about an unconstitutional search. This is the claim alleged against Mr. Schumaker in Plaintiff's Second Cause of Action, as to which Mr. Schumaker's prior motion for summary judgment on absolute and/or qualified immunity grounds was denied in part.

In ruling on the prior Motion, the Court held in part:

> In ¶¶ 40-41 [of the Third Amended Verified Complaint], Plaintiff recites eight pages of information which he avers Defendant Schumaker

> **actually knew** at the time he prepared the warrant application but which he failed to disclose to Judge Lorig. Upon examination of that extensive list of information, it seems entirely unlikely that Mr. Schumaker actually knew all of those things to be true on September 7, 1988. However, if he did actually know all of these facts to be true, and sought the search warrant anyway, this Court cannot say that a reasonable jury could not find that there was no probable cause, and facts pled must be taken as true for purposes of 12(b)(64) and 12(c) motions. What Mr. Schumaker actually knew will of course have to await discovery.
>
> The Court wishes to emphasize it is not basing its decision as to the Second Cause of Action in any way on Plaintiff's assertion that Mr. Schumaker **should have known** these facts, as opposed to actually knowing them. Negligence will not support a claim for relief under § 1983. *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). Plaintiff is asserting, as the Court reads ¶¶ 40-41, that Schumaker **actually knew** these facts and still omitted them from the search warrant application.
>
> Based on the foregoing analysis, Defendant Schumaker's motion to dismiss the § 1983 claim in the Second Cause of Action is DENIED.

(Doc. #166 at p. 13; footnotes omitted). Discovery has of course now been completed. Based on the results of the discovery, Plaintiff has not offered proof that Mr. Schumaker knew of facts not included in the search warrant affidavit which, if they had been included, would have been sufficient facts for a reasonable jury to find there was not probable cause for the search.

Plaintiff argues in opposing Defendant Schumaker's instant Motion that Schumaker participated in the investigation of Mr. Ridder by evaluating the state of the evidence at various points during the police investigation. This would appear to be an attempt to revive Plaintiff's First Cause of Action against Mr. Schumaker which the Court already ordered dismissed with prejudice. Even if the Court were faced with a formal motion to reconsider that decision, the evidence now presented after discovery would not persuade the Court to change its mind. It is perfectly appropriate for a prosecutor to evaluate evidence gathered during the course of an investigation as it proceeds; such conduct violates no constitutional right of a potential search target. Indeed, as Plaintiff points out, Mr. Schumaker kept telling the police officers up until September, 1988, that they didn't have enough for probable cause.

All claims against Defendant Schumaker under 42 U.S.C. §1983 will be DISMISSED WITH PREJUDICE.

CLAIMS AGAINST DEFENDANTS MENDA, MARCUM AND KERR

Defendants Menda, Marcum, and Kerr are sued under 42 U.S.C. §1983 for their involvement as Springfield police officers in Mr. Ridder's prosecution for rape.

Throughout this case, the overriding "theme" of Plaintiff's complaint against these officers is that they didn't do their duty toward him during this investigation. Plaintiff is aware that he cannot recover for mere negligence, so various levels of scienter have been alleged as involved in their behavior. As the Court now understands Plaintiff's

allegations, they are that these Defendants knew or should have known facts which should have led them to conclude Mr. Ridder was innocent of the crimes alleged.

Some of these facts are facts alleged to have been known to them but not included in the search warrant. With respect to those facts, the Court concludes that disclosing them in the search warrant would not have destroyed the probable cause otherwise demonstrated in the warrant affidavit.

Other facts are facts they allegedly should have discovered after Mr. Ridder was indicted, including facts from leads which Mr. Ridder or his stepfather gave them about his alibis. As to these facts or types of facts, Plaintiff alleges that, because he was charged with an offense, the State had a "special relationship" with him which obliged these Defendants to continue to investigate the case, and particularly facts which would exonerate him. No law is offered for this proposition. The Court concludes that these Defendants are at least qualifiedly immune from any such liability because Plaintiff has presented no clearly established constitutional law as of September, 1988, which would have required these Defendants to have done the investigation which is suggested.

In addition, the Court notes that Defendants aver, by affidavit or deposition testimony which Plaintiff does not rebut, that as soon as they learned that Mr. Ridder was in jail in Florida when the Katherine Davis rape was committed, they advised Mr. Schumaker. Plaintiff's argument leaps from the fact that he did not commit the Katherine Davis crime to the conclusion that he committed none of the rapes and the Defendants should have concluded that as soon as

they knew he had an alibi as to Katherine Davis. However, even with the Katherine Davis crime removed, there was still a probable cause finding as to a number of other serious crimes. While elimination of Mr. Ridder as the offender on one of the crimes does logically undermine the other charges because of the similar modus operandi, it does not lead ineluctably to the conclusion of innocence. For example, if the crimes and modus operandi were widely publicized, there could well have been copycat offenses.

In any event, there was no clearly established law in the fall of 1988 requiring police detectives who had gathered the information upon which an indictment was based to continue to investigate, and particularly to act as investigators on behalf of the accused.

The §1983 claims against Defendants Menda, Marcum, and Kerr are DISMISSED WITH PREJUDICE.

CLAIMS AGAINST DR. LAWRENCE

Plaintiff claims that Dr. Walter Lawrence was deliberately indifferent to Plaintiff's serious medical needs in violation of the Due Process Clause of the Fourteenth Amendment.

Intentional denial or indifference to medical care for the serious medical needs of an inmate is cruel and unusual punishment which is cognizable under 42 U.S.C. §1983. *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L. Ed. 2D 251 (1976). To be successful, an Eighth Amendment medical claim must contain both an objective component, that the medical needs were sufficiently serious, *citing*

Rhodes v. Chapman, U.S. 337 (1981); *McKinney v. Anderson*, 959 F. 2d 853, 854 (9th Cir.), *cert. granted*, 120 L. Ed. 2d 896 (1992); *Steading v. Thompson*, 941 F. 2d 498, 500 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1206, 117 L. Ed. 2d 445 (1992), and a subjective component, that the prison officials were deliberately indifferent to the prisoners' needs, citing *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); *McKinney*, 959 F.2d at 854, and *Steading*, 941 F.2d at 500. *Hunt v. Reynolds*, 974 F.2d 734 (6th Cir., 1992). Legal standards for the 14th Amendment claims of pretrial detainees are not materially different.

Plaintiff claims that Dr. Lawrence was deliberately indifferent to Mr. Ridder's serious medical need for treatment for his injured hand, particularly pain medication and physical therapy. The facts established in discovery show that Plaintiff had a very serious injury to his hand in July, 1988, several months before his incarceration. He had had surgery and was receiving physical therapy three times a week at the time of his arrest. The fact of the therapy was noted on the jail intake card when he was booked. However, upon seeing him approximately a week later, Dr. Lawrence concluded he did not need physical therapy at Miami Valley hospital three times a week.[2] Sometime later,

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[2] Plaintiff asserts and Dr. Lawrence denies that Dr. Lawrence said Plaintiff would get treatment at the penitentiary after he was convicted. If this fact were material, it would require trial. It is not material because there is no proof of the objective prong of this claim: that in fact Mr. Ridder did need physical therapy three times a week. There is also evidence in record that Dr. Lawrence offered to have Mr. Ridder transported to a local Springfield hospital for physical therapy. The Court does not rely on this evidence in reaching its conclusion.

apparently after Dr. Lawrence ceased being the jail physician in October, 1988, Mr. Ridder's lawyer obtained an order from the assigned Common Pleas Judge to have Mr. Ridder transported to Dayton for the treatments. At the time Mr. Ridder was booked, his wound was closed and was not draining. After his initial examination by Dr. Lawrence, Mr. Ridder never requested pain medication until he did so for a toothache around November 1, 1988.

Upon this state of facts, Dr. Lawrence is not liable to Mr. Ridder under 42 U.S.C. § 1983 because there is no competent evidence on the objective prong of the test. The injury Mr. Ridder had was not one obviously needing medical attention in September, 1988 (compare the compound fracture in *Estelle v. Gamble*, supra.). Absent an obvious-to-a-layperson need for treatment, the objective prong must rely on competent medical testimony and none has been offered here. Indeed, Mr. Ridder admitted on deposition that his hand surgeon, Dr. Peter Barre, told him he had not been damaged by the delay of physical therapy.

The § 1983 claim against Dr. Lawrence is DISMISSED WITH PREJUDICE.

CLAIMS UNDER 42 U.S.C. § 1985

In the Third Amended Verified Complaint, Plaintiff asserted claims under 42 U.S.C. § 1985. It is unclear from the Memorandum in Opposition whether Plaintiff continues to assert such claims.

To be actionable under this section, a conspiracy must be based on some racial "or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Macko v. Bryon*, 641 F. 2d 447 (6th Cir. 1981). A class protected by § 1985(3) must possess the characteristics of a discrete and insular minority, such as race, national origin, or gender. *Haverstick Enterprises v. Financial Federal Credit*, 32 F. 3d 989 (6th Cir. 1994), citing *Hicks v. Resolution Trust Corp.*, 970 F.2d 378, 382 (7th Cir. 1992).

Plaintiff has not identified any class to which he beings which fits the requirements of § 1985, nor has he established sufficient facts from which a jury could reasonably conclude that Defendants conspired against him on the basis of his membership in any such class. Any remaining claims under 42 U.S.C. § 1985 are DISMISSED WITH PREJUDICE.

CLAIMS UNDER STATE LAW

Plaintiff asserts in the Third Amended Verified Complaint a number of causes of action against various Defendants upon various theories under Ohio law. Because these claims are part of the same case or controversy as the federal claims, this Court has subject matter jurisdiction over them, supplemental to its jurisdiction over the federal claims, under 28 U.S.C. § 1367.[3]

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[3] 28 U.S.C. § 1367 codified under the label "supplemental jurisdiction" much of the prior decisional law which had been grouped under the label "pendent jurisdiction." § 1367 was added to the Judicial Code after this case was filed and after the claims for relief arose.

Claims for relief within the Court's supplemental jurisdiction are governed by state substantive law under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 2d 1188 (1938). In applying state law, federal courts in the Sixth Circuit follow the law of the State as announced by that State's supreme court. *Ray Industries, Inc. v. Liberty Mut. Ins. Co.*, 9474 F.2d 754, 758 (6th Cir. 1992); *Miles v. Kohli & Kaliher Assocs.*, 917 F.2d 235, 241 (6th Cir. 1990). "Where the state supreme court has not spoken, our task is to discern, from all available sources, how that court would respond if confronted with the issue." *Id.; In re Akron-Cleveland Auto Rental, Inc.*, 921 F.2d 659, 662 (6th Cir. 1990); *Bailey v. V & O Press Co.*, 770 F.2d 601 (6th Cir. 1985); *Angelotta v. American Broadcasting Corp.*, 820 F. 2d 806 (1987). The available data to be considered if the highest court has not spoken include relevant dicta from the state supreme court, decisional law of appellate courts, restatements of law, law review commentaries, and the "majority rule" among other States. *Bailey*, 770 F.2d at 604.

STATE LAW CLAIMS AGAINST THE CITY OF SPRINGFIELD

The remaining state law claims against the City of Springfield are for intentional infliction of emotional distress (16th), medical malpractice (11th), and civil conspiracy/civil recovery for a criminal act (17th).

However, there is no material difference between pendent jurisdiction and supplemental jurisdiction for purposes of this case.

As to the claim for intentional infliction of emotional distress, the Court concludes that Springfield is immune from liability by virtue of Ohio Revised Code §2744.02. See *Boggs v. Hughes*, 1994 WL 28635 (Greene Cty. App. 1994).[4]

As to the claim for medical malpractice, Springfield is not liable because it did not cause the original bodily injury, on the same analysis by which Defendant Schumaker was held not liable in Doc. #166.

As to the claim for civil conspiracy/civil recovery for a criminal act, Springfield's position that it is either immune under Ohio Revised Code §2744.02 or that it is not among the entities which can be held liable under these theories is well taken.

All state law claims against the City of Springfield are DISMISSED WITH PREJUDICE.

STATE LAW CLAIMS AGAINST MENDA, MARCUM, KERR AND EVANS

Plaintiff has not offered any evidence that Chief Evans had anything to do with his case. All state law claims against Defendants [sic] Evans are DISMISSED WITH PREJUDICE.

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[4] While Rule 2 of the Ohio Supreme Court Rules for the Reporting of Opinions imposes restrictions on the citation of unpublished decisions of Ohio courts and limitations on their precedential value, the *Boggs* decision is consistent with the language of the statute.

Upon the same analysis as noted above as to Defendant Schumaker, none of these Defendants is liable to Mr. Ridder for any medical malpractice committed on him in the County Jail and the Eleventh Cause of Action is, as to them, DISMISSED WITH PREJUDICE.

Plaintiff does not contend he has any evidence to show that any of these Defendant [sic] are liable for defamation and thus the Twelfth Cause of Action is, as to them, DISMISSED WITH PREJUDICE.

As to the Thirteenth and Fourteenth Causes of Action, the Court has previously indicated they could proceed only if it were established that these Defendants knew Mr. Ridder was innocent. Plaintiff has failed to proffer sufficient evidence from which a jury could reasonably conclude that they did know he was innocent, except that they did learn, apparently some time in December, 1988, that he had an established alibi for one of the rapes. They claim they promptly reported confirmation of that alibi to Mr. Schumaker and thus they are not liable with respect to it.

As to Plaintiff's claim against these Defendants for intentional infliction of emotional distress, they are immune under Ohio Revised Code §2744.03(A)(6). Plaintiff's Memorandum in Opposition repeat [sic] several times in connection with this claim "What could be more outrageous than keeping an innocent man in jail for five months?" The facts not mentioned by Plaintiff are that Mr. Ridder was identified in a line-up in September by five of the eight victims who viewed the line-up. He was thereafter indicted by a grand jury and committed in lieu of bond by a Common

Pleas Judge. Mr. Ridder is not an innocent man kept in jail for five months without due process of law or by the actions of these Defendants alone. The state law claims against these Defendants for intentional infliction of emotional distress are DISMISSED WITH PREJUDICE. Plaintiff has presented insufficient evidence from which a reasonable jury could conclude that these Defendants performed in this matter with malicious purpose, in bad faith, or in a wanton or reckless manner. Ohio Revised Code §2744.03(A)(6)(b).

As to Plaintiff's Seventeenth Cause of Action for civil conspiracy/civil recovery for a criminal act, the Court concludes Plaintiff has not presented sufficient evidence from which a reasonable jury could conclude there was any conspiracy here or any criminal act.

As to the alleged criminal act - - interference with civil rights - - the Court has set forth its conclusion above that these Defendants did not interfere with Plaintiff's civil rights. With respect to the conspiracy charge, Plaintiff has produced evidence that these three Defendants worked together and with Mr. Schumaker with respect to preparing the case. This is insufficient, however, to make a prima facie case of conspiracy. Police officers who are assigned to work together are supposed to cooperate, and their cooperation does not become an unlawful conspiracy because they consult the county prosecutor.

A civil conspiracy under federal law is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is agreement among the parties. *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th

Cir. 1979), *rev'd in part on other grounds*, 446 US. 754 (1980). To prevail on a conspiracy claim, a plaintiff must establish an express or implied agreement among defendants to deprive plaintiff of his or her rights and an actual deprivation through overt acts in furtherance of the conspiracy. *Kunik v. Racine County*, 946 F.2d 1574, 1580 (7th Cir. 1991); *Scherer v. Balkema*, 840 F. 2d 437, 442 (7th Cir.), *cert. denied*, 846 U.S. 1043 (1988).

In Ohio, a civil conspiracy consists of the following: (1) a malicious combination; (2) two or more persons; (3) injury to person or property; and (4) existence of an unlawful act independent from the actual conspiracy. *Universal Coach v. NYC Transit Authority*, 90 Ohio App. 3d 284 (Cuyahoga Cty., 1993), citing *Minarik v. Nagy*, 8 Ohio App. 2d 194, 26 Ohio Op. 2d 359, 193 N.E. 2d 280 (1963). The Ohio element of "malicious combination" incorporates the federal (and common law) elements of combination for an unlawful purpose or to carry out a lawful purpose by an unlawful means. The Plaintiff here has failed to produce any evidence of a conspiracy among any of the Defendants for an unlawful purpose or to carry out a lawful purpose by unlawful means.

STATE LAW CLAIMS AGAINST DEFENDANT SCHUMAKER

The remaining state law claims against Defendant Schumaker are the Twelfth Cause of Action for defamation and the Seventeenth Cause of Action for conspiracy/civil recovery for a criminal act.

Upon the same analysis as set forth above as to Defendants Menda, Marcum, and Kerr, Defendant Schumaker is not liable to Plaintiff on Plaintiff's Seventeenth Cause of Action, which is hereby DISMISSED WITH PREJUDICE.

The sole basis of the defamation claim at this point in the proceedings[5] is Mr. Schumaker's purported comments during a televised press conference on the evening of September 9, 1988. At his deposition Plaintiff himself claimed to have seen several different news broadcasts that evening including a statement by Mr. Schumaker that Plaintiff was the Northern Estates rapist.

Plaintiff claimed to have a videotape of some or all of these broadcasts which he gave to his counsel. Plaintiff's counsel previously advised the Court that he had such a videotape, but now indicates it cannot be found.

As evidence of the defamation, Plaintiff relies on the testimony of Peter Collier, but at his deposition Mr. Collier denied being able to identify Mr. Schumaker as having made any defamatory comments. (Collier Depo., pp. 14-15). Mr. Ridder also relies on his own observation of Mr. Schumaker on television on September 9, 1988, the day of the arraignment, stating that Mr. Ridder was the Northern Estates rapist. Mr. Ridder does not remember that it was a press conference, but merely that Mr. Schumaker was on

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5 Plaintiff had previously alleged that Mr. Schumaker made defamatory remarks during his reelection campaign in the fall of 1988. Mr. Schumaker denied doing so and Plaintiff now admits he has no evidentiary support for that claim. Plaintiff depo. at pp. 486-488.

television. Mr. Schumaker denies ever granting any press conferences about this case, although he did make a written press release which Plaintiff does not contend was defamatory.

Ohio courts have been open to television cameras since well before these events occurred, and it is not uncommon to see excerpts from arraignment proceedings on local television. Thus Mr. Schumaker's comments, if they happened at all, must have been televising him from open court. His comments made under those circumstances are absolutely privileged under Ohio law under the authority cited by Mr. Schumaker (Doc. #229 at p. 26). While Mr. Ridder is correct in his argument (Doc. #241, p. 6) that an Ohio prosecutor cannot go before the press and make any statement he wishes about a pending case, Mr. Ridder has no evidence to refute Mr. Schumaker' statement that he did not give a press conference. The most that can be proved, if a jury accepted Mr. Ridder's statement that he saw Mr. Schumaker on television, is that it was a televised privileged proceeding.

The defamation claim against Mr. Schumaker is DISMISSED WITH PREJUDICE. This conclusion is reached without drawing any adverse inference against Mr. Ridder from the spoliation of the videotape by his counsel.

STATE LAW CLAIMS AGAINST CLARK COUNTY AND SHERIFF KELLY

The only remaining state law claims which Plaintiff presses (See Doc. #244) against Clark County and Sheriff Kelly are for medical malpractice and intentional infliction of

emotional distress by "keeping an innocent man in jail for five months." They are not liable for the latter since they had no discretion about keeping Mr. Ridder in jail. When a Common Pleas Judge commits a person in lieu of bond prior to trial, the Sheriff as custodian has no discretion to decide that the person is innocent and release him.

Until the time it read the motions for summary judgment, the Court believed Plaintiff's medical malpractice claim against these Defendants was only derivative from his claim against Dr. Lawrence. In the motion papers, it has become clear that Mr. Ridder also claims he was not properly treated after Dr. Lawrence ceased to be the jail physician, although no first-line persons[6] have been added as Defendants.

This difference in approach, however, is immaterial. Plaintiff cannot prove a case of medical malpractice against any Defendant because he has no competent medical testimony establishing a standard of care or deviation from it. As noted above, this is completely independent of the Court's striking Plaintiff's expert witnesses, since the "evidence" offered on this question - - the letters of Drs. Paley and Ramnath - - is incompetent under Fed. R. Civ. P. 56(e).

The medical malpractice claim against Clark County and Sheriff Kelly is DISMISSED WITH PREJUDICE.

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[6] That is, persons who would have been immediately responsible for Mr. Ridder's custody or treatment, as opposed to Sheriff Kelly, whom the Court understands is alleged only to have had a supervisory role.

STATE LAW CLAIMS AGAINST DR. WALTER LAWRENCE

At his deposition Mr. Ridder admitted he had no evidence Dr. Lawrence conspired with anyone. Plaintiff argues in his motion papers (Doc. #243 at p. 7) that a conspiracy between Dr. Lawrence and the police can be inferred from the fact that the police "knew" (i.e., it was on the book-in card) that Mr. Ridder needed therapy three times a week and the fact that Dr. Lawrence had that card available to him. Dr. Lawrence has sworn he spoke to none of the other Defendants about Mr. Ridder. No reasonable jury could infer an agreement in the absence of any communication. The conspiracy claim against Dr. Lawrence is DISMISSED WITH PREJUDICE.

For the reasons stated above as to Clark County and Sheriff Kelly, the medical malpractice claim against Dr. Lawrence must also be DISMISSED WITH PREJUDICE. The need for physical therapy for the injured hand is not one which is within common knowledge of laypersons so as not to require expert testimony. Plaintiff has both failed to qualify experts to testify at trial and has failed to offer competent evidence of deviation from the accepted standard of care in his opposition to Dr. Lawrence's Motion for Summary Judgment.

CONCLUSION

In accordance with the foregoing Decision and the Court's prior decisions herein, which are hereby expressly made final, the Clerk shall enter judgment against the Plaintiff and in favor of the Defendants, dismissing all of

Plaintiff's claims herein with prejudice. Costs will be taxed against the Plaintiff.

/s/_____
Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

February 27, 1995

FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN MICHAEL RIDDER * CASE NO. C-3-90-003

Plaintiff(s),

-vs-

Magistrate Judge Michael R. Merz

CITY OF SPRINGFIELD, OHIO, et al.,

Defendants *

ORDER GRANTING MOTION FOR EXTENSION OF TIME AND DENYING MOTION FOR STAY

Filed April 20, 1995

Plaintiff's Motion for Extension of Time (Doc. #278) to respond to Defendant Schumaker's Motion for Interim Award of Attorney Fees and the City of Springfield's Motion for Attorney Fees is GRANTED. Plaintiff's memorandum in opposition to each of said Motions shall be filed not later than May 5, 1995.

It is inappropriate to delay consideration of these two sanctions motions and any other which might be filed until after the Sixth Circuit has determined the pending appeal from final judgment on the merits. The present sanctions motions are closely intertwined with the merits of this action. The amounts sought are substantial and thus the losing party(ies) on the sanctions motions are unlikely to forego their right to appeal from that decision. Thus deciding the

sanctions motions after the Court of Appeals reaches the merits of the appeal will substantially serve judicial economy in that court and avoid piecemeal appeals. Accordingly, Plaintiff's Motion for Stay (Doc. #279) is DENIED.

April 20, 1995. /s/_____

Michael R. Merz
UNITED STATES MAGISTATE JUDGE

Nos. 95-3358/4220

STEPHEN MICHAEL RIDDER Plaintiff-Appellant, v. CITY OF SPRINGFIELD,ET AL. Defendants-Appellees.	)	ORDER Filed April 28, 1997

BEFORE: SUHRHEINRICH and MOORE, Circuit Judge; and MCKINLEY,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggetsion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____

Leonard Green, Clerk

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* Hon. Joseph H. McKinley, United States District Judge for the Estern District of Kentucky, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STEPHEN MICHAEL RIDDER * CASE NO. C-3-90-003
2825 Nausset St.
Springfield, Ohio 45503 *

Plaintiff *

vs. * VERIFIED COMPLAINT WITH

CITY OF SPRINGFIELD,OHIO * JURY DEMAND
130 N. Fountain Ave. ENDORSED HEREON
Springfield, Ohio 45502 *

and * (Filed January 4, 1990)

CLARK COUNTY, OHIO *
By and Through the Clark
County Board of Commissioners *
120 N. Fountain Ave.
Springfield, Ohio 45502 *

and *

STEPHEN A. SCHUMAKER *
Personally And In His Capacity
As The Prosecuting Attorney *
Of Clark County, Ohio; And
For His Conduct Outside of *
His Office As Clark County,
Prosecutor While Still *
Representing Himself Under
The Color of Law *
120 N. Fountain Ave.
Springfield, Ohio 45502 *

and *

GENE A. KELLY, Individually *
And In His Capacity As
the Sheriff of Clark County *
Ohio
120 N. Fountain Ave. *
Springfield, Ohio 45502
*

and

ROGER EVANS, Individually *
And In His Capacity
As Chief of Police of *
Springfield, Ohio
130 N. Fountain Ave. *
Springfield, Ohio 45502
*

and
*

SGT. ROBERT MARCUM
Individually and In His *
Capacity As A Sergeant of
The Springfield Police *
Department
130 N. Fountain Ave. *
Springfield, Ohio 45502
*

and

DET. RONALD MENDAH
Individually and In His *
Capacity As A Detective of
The Springfield Police *
Department
130 N. Fountain Ave. *
Springfield, Ohio 45502
*

and

DET. ROBERT KERR
Individually and In His Capacity As A Detective of The Springfield Police Department
130 N. Fountain Ave.
Springfield, Ohio 45502

and

DR. WALTER LAWRENCE
5212 Taywell Dr.
Springfield, Ohio 45503

and

ALL OTHER JOHN OR JANE DOES
As Individuals, Entities, or Others Who Initiated, Aided, or Abetted the Defendants Against the Plaintiff in the Case At Bar.

Defendants

INTRODUCTION

1. This action arises under the provisions of the Fourteenth amendment to the Constitutions of the United States, The Fourth Amendment, Fifth Amendment, and Eighth Amendment, and Title 42 of the United States Code, Section 1983, and all other related sections thereto, including, but not limited to Sections 1985 through 1988, et seq.

2. This Court has jurisdiction of this case under Title 28 of the United States Code, Section 1343, the constitutional questions presented, and all other basis of jurisdiction, including pendent jurisdiction of the Court.

3. At all times material hereto, the Plaintiff, STEPHEN MICHAEL RIDDER has been domiciled in Clark County, Ohio, in the Southern District of Ohio, Western Division, and is a citizen of the United States.

4. The claim for which Plaintiff herein brings this action arises from the wanton acts and omissions of the Defendants which occurred in Springfield, Clark County, Ohio, as well as the proximate areas, in the Southern District of Ohio, Western Division.

5. The CITY OF SPRINGFIELD, Clark County, Ohio, is a municipal corporation and government subdivision of the State of Ohio of which the SPRINGFIELD CITY POLICE DEPARTMENT is a part thereof.

6. The COUNTY OF CLARK, STATE OF OHIO, by and through the Clark County Board of County Commissioners is a governmental subdivision of the State of Ohio of which the Clark County Sheriff's Department is a part.

7. The Defendant, STEPHEN A. SCHUMAKER, at all times material hereto was employed by Clark County, State of Ohio, as the Prosecuting Attorney. This action is being taken for his wanton, willful,

reckless, and/or negligent misconduct both in his capacity as the Prosecuting Attorney wherein he enjoys qualified immunity, and outside the conduct of his office as Prosecutor for conduct was taken negligently, recklessly, wantonly, or willfully outside the scope of his employer.

8. The Defendant, DR. WALTER LAWRENCE, is a medical doctor licensed to practice medicine in the State of Ohio and, as such, was in charge of delivering medical care and treatment in the Clark County Jail at all times relevant to the case at bar and, in particular, responsible to deliver appropriate care and treatment to the Plaintiff in the case at bar. Dr. Lawrence is sued in his capacity as an employee of Clark County, Ohio, and individually for his conduct as hereinafter alleged.

9. The Defendant, SHERIFF GENE A. KELLY, was at all times pertinent hereto in charge of the Clark County Jail, in charge of the prisoners incarcerated therein, including Defendant from September 8, 1988 to January 4, 1989, responsible for their care, treatment, control, as well as providing of all appropriate medical services. It was directly by the Defendant , Gene A. Kelly, that the Plaintiff was falsely incarcerated, imprisoned, and prosecuted as hereinafter set forth. Sheriff Kelly is sued as an individual and in his capacity as the County Sheriff.

10. The Defendant, ROGER EVANS, was the Chief of Police of Springfield, Ohio, and directly in charge of the issuance of warrants, conducting any line-ups, the pre-arrest investigation, investigation, prosecution, and incarceration of the Plaintiff for sometime before September

8, 1988 to January 10, 1989 when an Entry of Dismissal was journalized in the Clark County Court of Common Pleas. Roger Evans is sued individually and in his capacity as Chief of Police.

11. The Defendants, SGT. ROBERT MARCUM, DET. RONALD MENDAH, [sic] and DET. ROBERT KERR were at all times acting as police agents, and were acting both in the scope of their employment as police officers for the City of Springfield, Ohio and outside the scope of their employment when certain information became known to them and they failed to disclose same for purposes of preventing, ceasing, or ameliorating the unlawful conduct toward the Plaintiff as hereinafter alleged. These people are sued both in their capacity as police officers and individually.

12. The conduct of the Defendants complained of hereinafter was done under color of state law and by reason of governmental authority pursuant to statute, ordinance, custom and usage. However, some of the conduct was outside of their authority pursuant to state law, state and governmental authority and, as such, they are individually liable, as well as liable in their capacity as public officers.

13. At all times in the case at bar the Defendants were domiciled in Clark County, Ohio.

14. All causes of action arising under state law either statutorily or by common law, are grounds set forth for relief hereinafter pursuant to the pendent jurisdiction of this Court.

15. At all times relevant to the matters alleged hereinafter, the Plaintiff was a citizen of the United States of America, without disability relating to his citizenship, and thereby entitled to all the privileges and immunities thereto.

16. At all times alleged in this Complaint, the Defendants, JOHN OR JANE DOE, are those parties whose improper actions adversely affected the Plaintiff, but who cannot be readily identified and whose names will be made known as their identities become known through discovery.

17. This Complaint is being filed upon reasonable belief and after initial investigation based upon facts presented to counsel on or about December 22, 1989, and because of the inability to appropriately investigate all matters surrounding same, counsel reserves leave pursuant to Rule 15 of the Federal Rules of Civl Procedure to timely supplement and amend the aforesaid Complaint.

FIRST CAUSE OF ACTION

18. Plaintiff alleges each and every allegation contained in paragraphs one (1) through seventeen (17) as if fully rewritten herein.

19. At all times material hereto, STEPHEN MICHAEL RIDDER, was a resident of Clark County, Ohio, and was entitled to exercise his rights as a citizen of the State of Ohio and United States without fear of unlawful detention, incarceration, malicious prosecution, wrongful arrest, denial of his constitutional rights, subjection to cruel and unusual punishment, and denial of appropriate medical care and treatment.

20. Some of the acts of the Defendants set forth hereinabove were under the color of law and pretense of statutes, ordinances, regulations, customs, and usages of the State of Ohio, and under the authority of the offices that they held. Some of the conduct, however, was, in fact, outside of the lawful duties of the aforesaid Defendants and constituted acts which subject them to prosecution for actual malice and defeats any qualified or absolute immunities which they have under said public office.

21. Said malice, as aforesaid, was actual, willful wanton, intentional, and/or reckless misconduct.

22. On or about September 7, 1988, the Defendants wrongfully, unlawfully, untruthfully, without probable cause, and with actual malice, caused a search warrant to be issued without probable cause alleging that the aforesaid Defendant [sic] was a rapist and guilty of certain criminal conduct. A copy of the aforesaid search warrant is attached hereto and incorporated herein as if fully rewritten as Exhibit "1".

23. As a direct and proximate result of the filing of the aforesaid search warrant without probable cause, the Defendant was subjected to unlawful searches and seizures of his person and property and caused to be arrested.

24. At all times material hereto the Defendants had information, or had information available upon reasonable inquiry, that would indicate that the Plaintiff had an alibi for many of the acts alleged in the search warrant,

being out of the State, but instead sought the issuance of the search warrant regardless.

25. On or after September 7, 1988, as a result of the aforesaid improper investigation and improper and unlawfully issued search warrant, the Plaintiff was caused to be arrested and indicted on fourteen (14) counts. The indictment is attached hereto and incorporated herein as if fully rewritten and sets forth the fourteen (14) counts.

26. The aforesaid indictment was issued unlawfully, untruthfully, and with actual malice, alleging that the Plaintiff had been guilty of the various state crimes.

27. Prior to September 7, 1988, and thereafter, the Defendants continued to investigate the aforesaid Plaintiff and his acts, conduct, and whereabouts during the alleged crimes. The Defendants had available to them information that he was not even in the State on some of the alleged dates but recklessly ignored same; they also obtained information that pursuant to DNA testing that he could not be guilty of the crime and even after that became known to them, they continued to incarcerate him for an even further length of time.

28. Thereafter, the Defendants sought and obtained an extremely high bond without probable cause, causing the Plaintiff to be unnecessarily incarcerated during the pendency of his criminal prosecution.

29. Thereafter, the Defendant, Stephen Schumaker, caused great publicity to be made of this arrest

and used such publicity in his political campaign to obtain re-election. He did so with actual malice outside the scope of his office.

30. The Defendants, thereafter, also subjected the Plaintiff to unlawful and improper police line-ups, and had him improperly identified as a potential suspect thereby amassing additional evidence without probable cause, in a reckless disregard of their duties, and without regard to a reasonable inquiry by an objective, reasonable, independent law enforcement officer as required by the duties of their office.

31. The Defendants further attempted to obtain improper admissions and statements from the Plaintiff and attempted to get him to plead guilty to lesser crimes, or a fewer number of crimes, under a plea bargaining arrangement stating that they would, in fact, see that he would not get treated as harshly if he would do so.

32. All of the aforesaid investigation was biased and designed not to prove the facts of the case, nor to follow any leads that were favorable to the Plaintiff or to show his innocence but, instead, to assure a successful criminal prosecution of the Plaintiff who, in fact, was innocent of any and all charges.

33. Such conduct by the Defendants was done with actual malice and without probable cause and did actual harm to the Plaintiff causing him severe damages which entitle him to compensatory and punitive damages.

34. The Defendants knew, or should have known, that they were unable to conduct a fair and impartial investigation of the Plaintiff after the comments and publicity surrounding same as provided to the news media by the Defendants and, in particular, Stephen Schumaker and they failed to correct their conduct toward the Plaintiff or to, in fact, cease and desist their unlawful conduct.

35. The prosecution and actual incarceration of the Plaintiff continued until January 4, 1989. Attached hereto as Exhibit "2" is a copy of a Request for Discovery made by Stephen A. Schumaker wherein it was indicated that this trial was going to proceed and go forward on January 11, 1989. This request is attached hereto and incorporated herein as if fully rewritten.

36. The aforesaid Request for Discovery was made after the prosecutor, Stephen A. Schumaker, and the other Defendants knew, as a matter of fact, that the Plaintiff could not possibly have committed the crime because of the DNA testing done. This was later admitted to by the Defendants but they, instead, were still seeking to obtain some type of plea arrangement or plea agreement whereby the Plaintiff would, indeed, plead guilty.

37. At all times material hereto the Defendants knew, or should have known, that the allegations made against the Plaintiff were false and a result of inadequate investigation and malicious prosecution.

38. At some time during the investigation it became undeniably clear that the Plaintiff was, in fact, not guilty of the crimes and he still was forced to undergo

criminal prosecution and remained incarcerated without probable cause and maliciously detained against his rights.

39. The conduct of the Defendants, as aforesaid, deprived the Plaintiff of due process of law and the right to equal protection of law secured by the Fourteenth Amendment of the Constitution of the United States.

40. The conduct of the Defendants, including but not limited to the activities alleged heretofore and stated hereinafter, violated Title 42 of the United States Code, Section 1983 and other related Sections thereunder.

41. As a direct and proximate result of the conduct of the Defendants, jointly and severally, the Plaintiff suffered a loss of freedom, malicious criminal prosecution, false arrest, false imprisonment, denial of his constitutional rights to be safe and secure in his person and property, denial of his due process rights, claims for medical malpractice and lack of adequate medical care while detained as a prisoner, denial of his fundamental rights at critical stages of the investigatory process, attorney fees for defense, investigative fees, loss of his reputation, defamation to his character, damage to his quality of life, job endangerment, permanent loss of future economic opportunities and employment with a permanent diminishment in earning capacity, and other related damages which are not apparent but permanent and [sic] nature.

42. The acts, conduct, and behavior of the Defendants was performed knowingly, intentionally, recklessly, and/or maliciously, by reason of which Plaintiff

is entitled to an award of punitive damages, along with all appropriate damages.

SECOND CAUSE OF ACTION

43. The Plaintiff realleges each and every allegation contained in paragraphs one (1) through forty-two (42) as if fully rewritten herein.

44. The Defendants maliciously, wrongfully, under color of law, and without probable cause, caused the indictment to be issued against the Plaintiff and caused said prosecution to continue against the Plaintiff for the crimes alleged.

45. There was indeed a malicious filing of an indictment.

46. There was a lack of probable cause for filing the indictment.

47. The prosecution has been terminated in favor of the Plaintiff pursuant to the attached Exhibit "3" which is an Entry whereby on January 12, 1989, the indictment was dismissed against the Plaintiff.

48. The indictment resulted in Plaintiff's favor.

49. The unlawful acts of the Defendants caused an actual seizure of the Plaintiff's person and property during the course of prosecution.

50. All of the aforesaid acts and conduct resulted in injury and damages to the Plaintiff.

THIRD CAUSE OF ACTION

51. Plaintiff realleges each and every allegation contained in paragraphs one (1) through fifty (50) as if fully rewritten herein.

52. False arrest and imprisonment resulted from the aforesaid conduct of the Defendants by which the Plaintiff was deprived of his physical liberty.

52. [sic] The arrest was unlawful and made without probable cause by a person who was authorized to make the arrest but had reason to believe, or upon reasonable inquiry would have had reason to believe that the Plaintiff was not guilty of the crime.

53. The arrest was effected under color of law and thereafter the Plaintiff was forced to be incarcerated until January 4, 1989, and subject to prosecution until January 12, 1989.

54. Further, the Plaintiff was caused to be unlawfully falsely imprisoned by his incarceration and, indeed, was continued to be falsely imprisoned as a result of the wrongful conduct of the Defendants after they became aware beyond a reasonable doubt that he was innocent.

55. As a result of the unlawful conduct of the Defendants, as aforesaid, the Plaintiff proximately suffered damages.

FOURTH CAUSE OF ACTION

56. Plaintiff reincorporates each and every allegation contained in paragraphs one (1) through fifty-five (55) as if fully rewritten herein.

57. The indictments were returned without any type of reliable investigation and were returned based upon conduct of the Defendants which fell well below the usual, customary standards of their office, and indeed in contravention thereof, or of any other similarly situated office holders in the jurisdiction of this Honorable Court.

58. The issuance of said indictment was not only done maliciously and without probable cause but was an abuse of the criminal process and in direct contravention to the rights of the Plaintiff pursuant to the law and constitutions of the State of Ohio and United States of America.

59. Thereunder, under this investigation, the Defendants did jointly and severally, under color of their office and, at times, outside of the color of their office do the following inappropriate activities:

(A) Fail to obtain a warrant upon probable cause;

(B) Improperly conducted police line-ups;

(C) Improperly took statements from the Plaintiff and witnesses;

(D) Failed to follow-up alibis, defenses, and other available information that showed the innocence of the Plaintiff;

(E) Failed to review any and all evidence of mitigation including, but not limited to the DNA reports in a timely appropriate manner;

(F) The Defendant, Stephen Schumaker, inappropriately, maliciously, and without probable cause, used the unfortunate circumstances of the Plaintiff improperly to his benefit for political purposes outside of the scope of his office, relying on all the other improper conduct of the Defendants having reason to believe that such conduct was done outside the scope of their offices, maliciously and without probable cause.

FIFTH CAUSE OF ACTION

60. Plaintiff realleges each and every allegation contained in paragraphs one (1) through fifty-nine (59) as if fully rewritten herein.

61. As a result of the aforesaid malicious conduct of the Defendants, there proximately resulted a loss of employment, employment opportunities, and workers compensation benefits to the Plaintiff.

62. Said losses were in violation of the civil rights of the Plaintiff pursuant to the laws and the constitutions of the Sate of Ohio and United States of America.

SIXTH CAUSE OF ACTION

63. Plaintiff realleges each and every allegation contained in paragraphs one (1) through sixty-two (62) as if fully rewritten herein.

64. Prior to September 7, 1989, [sic] the Plaintiff had suffered a grievous injury to his hand and was trying to recover from what was a very serious, obvious, and open injury.

65. While the Plaintiff was incarcerated he requested medical treatment in the form of follow-up therapy for his hand which had suffered a permanent injury as a result of a saw but which needed physical therapy on a regular basis in order to recover to as great an extent as possible for the use of the aforesaid hand.

66. Upon being informed of the need for follow-up therapy, the Defendants advised the Plaintiff that he would get excellent medical care when he got to prison and not to expect them to take him to Miami Valley Hospital from the Clark County Jail in order to receive treatment. This was stated to the Plaintiff, by the Defendant, Dr. Walter Lawrence, who was acting in the course of and arising out of his employment with Clark County, Ohio, and further was acting independently and under his duty and profession as a physician licensed to practice in the State of Ohio.

67. The Defendant, Walter Lawrence, failed to exercise the reasonable degree of care required of a physician of his attainment and failed to provide adequate medical advice, care, and treatment to the Plaintiff and as a result thereof, the Plaintiff has suffered permanent and grievous injury of a physical nature as well as emotional pain and suffering because of the permanency of the injury.

68. The aforesaid conduct of the Defendant, Dr. Walter Lawrence, under the authority and direction of the Defendant, Clark County, Sheriff of Clark County, Clark County Board of County Commissioners, as well as all other Defendants who had authority and supervisory capacity over him as law enforcement officers are liable for the negligence and failure to provide adequate medical care and treatment to the Plaintiff.

69. After the Plaintiff had been incarcerated for seven (7) weeks, his condition became so bad that they did, in fact, transport him to Miami Valley Hospital where he received medical care which was too little and too late.

70. The aforesaid conduct constituted cruel and unusual punishment and a deprivation of the rights of the Plaintiff pursuant to the Ohio and United States constitutions as well as an act of malpractice pursuant to the statutory law of Ohio.

71. As a proximate result of the aforesaid unlawful conduct, failure to provide medical treatment, malpractice, cruel and unusual punishment, failure to provide adequate care at a detention facility, the Plaintiff has suffered severe damages in the form of lost wages, future

lost wages, permanent disability, permanent pain, suffering and scarring, and that said conditions with continue into the future.

SEVENTH CAUSE OF ACTION

72. Plaintiff realleges each and every allegation contained in paragraphs one (1) through seventy-one (71) as if fully rewritten herein.

73. The Defendants, jointly and severally, issued written and verbal statements asserting that the Plaintiff was guilty of the many crimes for which he was indicted and that he was an [sic] indeed an infamous rapist, and that he would be subject to continued criminal prosecution and incarceration.

74. The Defendants maliciously published these defamatory statements to third persons including, but not limited to, the general public and other parties.

75. As a result of the aforesaid malicious publications virtually every person in the jurisdictional area of this Court became aware through radio, newspapers, television, and personal statements that the plaintiff was falsely accused of being a rapist and criminal. There was no doubt that these references were made toward the Plaintiff.

76. All the aforesaid material was false, or should have been known to be false, and was made maliciously. Upon reasonable inquiry there would have been no reason to have made the aforesaid publications.

77. The aforesaid publications were libelous and slanderous per se and the Plaintiff is entitled to compensatory damages for harm to his employment, damages to his future employment, damages to his relationships with others, damages to his general reputation and home life.

78. As a direct and proximate result of the aforesaid false and malicious statements published by the Defendants, the Plaintiff is also entitled to punitive damages.

79. Many of the aforesaid false and malicious statements were made by Stephen Schumaker in order to promote his public career, thereby being unprivileged as being in malicious and disregard of the truth.

EIGHTH CAUSE OF ACTION

80. Plaintiff realleges each and every allegation contained in paragraphs one (1) through seventy-nine (79) as if fully rewritten herein.

81. The Defendants engaged in reckless, wanton, malicious, and/or intentional conduct submitting the Plaintiff herein to an unfair investigation and unfair deprivation of his due process of law.

82. As a proximate result of said investigation the Plaintiff was subjected to false arrest, false imprisonment, abuse of process, and malicious prosecution as well as other improper conduct toward him.

83. The aforesaid conduct on the part of the Defendants was malicious and in wanton disregard of the Plaintiff's rights.

84. As a direct and proximate result of Defendants intentional and/or reckless and/or malicious misconduct, the Plaintiff has suffered severe emotional distress.

85. Said severe emotional distress is permanent in nature and entitles Plaintiff to both compensatory and punitive damages.

NINTH CAUSE OF ACTION

86. Plaintiff realleges each and every allegation contained in paragraphs one (1) through eighty-five (85) as if fully rewritten herein.

87. All Defendants' activity was in consultation with each other and they acted in concert with each other and were mutually aware of information available which indicated that the Plaintiff as being inappropriately incarcerated, prosecuted, unlawfully denied medical treatment, and subject to the aforesaid other illegal acts.

88. All the aforesaid Defendants acted in concert with the other and will [sic] knowledge of what the other knew or, should have known what other information was available to each other. As such, such constituted conspiracy to deprive the Plaintiff of his rights under the Ohio and United States constitutions.

WHEREFORE, Plaintiff demands judgment jointly and severally against the Defendants for TEN MILLION DOLLARS ($10,000,000.00) in compensatory damages and TEN MILLION DOLLARS ($10,000,000.00) in punitive damages together with pre-judgment interest, post judgment interest, the Plaintiff's reasonable attorney fees and costs, and for all other relief to which he may be deemed entitled either at equity or at law.

/s/ Dwight D. Brannon
Dwight D. Brannon
BRANNON, HALL & TUCKER
Attorney for Plaintiff
Sixth South Patterson Blvd.
Dayton, Ohio 45402
(513) 228-2306
0021657

/s/ Jose M. Lopez by DDB
Jose M. Lopez
HUFFMAN, LANDIS, WEAKS,
& LOPEZ CO., L.P.A.
Attorney for Plaintiff
103 N. Miami St.
West Milton, Ohio 45383
(513) 698-5464
0019580

JURY DEMAND

Plaintiff respectfully demands a trial by jury on all issues contained herein.

BRANNON, HALL & TUCKER

/s/ Dwight D. Brannon

/s/ Jose M. Lopez/DDB

AFFIDAVIT

STATE OF OHIO)
) SS:
COUNTY OF MONTGOMERY

STEPHEN MICHAEL RIDDER, being first duly cautioned and sworn according to law deposes and says that the foregoing facts are true and correct to the best of his knowledge.

Further Affiant Sayeth Naught

/s/ Stephen Michael Ridder

Sworn to before me, a Notary Public, and subscribed in my presence this 4th day of January, 1990.

/s/ Crystal L. Clemons
Notary Public
Crystal L. Clemons,
Notary Public
In and for the State of Ohio
My Commission Expires
May 11, 1994

Exhibits Not Attached to This Appendix.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STEPHEN MICHAEL RIDDER 2825 Nauset St. Springfield, Ohio 45503	*	CASE NO. C-3-90-003 (Judge Herman J.Weber) (Magistrate Merz)
Plaintiff	*	
vs.	*	
CITY OF SPRINGFIELD, OHIO 130 N. Fountain Ave. SPRINGFIELD, OH 45502	*	FIRST AMENDED VERIFIED COMPLAINT WITH JURY DEMAND ENDORSED HEREON
and	*	
CLARK COUNTY, OHIO By And Through the Clark County Board of Commissioners 120 N. Fountain Ave. Springfield, Ohio 45502	*	(Filed October 1, 1990)
and	*	
STEPHEN A. SCHUMAKER Personally And In His Capacity As The Prosecuting Attorney Of Clark County, Ohio; And For His Conduct	*	

Outside of His Office As
Clark County, Prosecutor *
While Still Representing
Himself Under The Color *
Of Law *
120 N. Fountain Ave.
Springfield, Ohio 45502 *

and *

GENE A. KELLY, Individually *
And In His Capacity As The
Sheriff of Clark County , Ohio *
120 N. Fountain Ave.
Springfield, Ohio 45502 *

and *

ROGER EVANS, Individually *
And In His Capacity As Chief
of Police of Springfield, Ohio *
45502

*

and

*

SGT. ROBERT MARCUM
Individually and In His Capacity *
As A Sergeant Of The
Springfield Police Department *
130 N. Fountain Ave.
Springfield, Ohio 45502 *

and *

DET. RONALD MENDAH *
Individually and In His Capacity
As A Detective of The Springfield *
Police Department
130 N. Fountain Ave. *
Springfield, Ohio 45502

and *

DET. ROBERT KERR *
Individually and In His Capacity
As A Detective of The Springfield *
Police Department
130 N. Fountain Ave. *
Springfield, Ohio 45502
*

and
*

DR. WALTER LAWRENCE
Individually as a Doctor For *
Plaintiff, and In His Capacity as
a Doctor for Clark County, Ohio *
5212 Taywell Dr.
Springfield, Ohio 45503 *

Defendants *

INTRODUCTION

1. This action arises under the provisions of the Fourteenth Amendment to the Constitutions of the United States, The Fourth Amendment, Fifth Amendment, and Eighth Amendment, and under Title 42 of the United States Code, Section 1983, and all other related sections thereto, including, but not limited to Sections 1985 through 1988, et seq.

2. This Court has jurisdiction of this case under Title 28 of the United States Code, Section 1343, the constitutional questions presented, and all other basis of jurisdiction of the Court.

3. At all times material hereto, the Plaintiff, STEPHEN MICHAEL RIDDER has been domiciled in Clark County, Ohio, in the Southern District of Ohio, Western Division, and is a citizen of the United States.

4. The claim for which Plaintiff herein brings this action arises from the intentional, reckless, wanton, and/or deliberately indifferent acts and omissions of the Defendants which occurred in Springfield, Clark County, Ohio, as well as the proximate areas, in the Southern District of Ohio, Western Division. The Defendants are alleged to have known, or should have known, that they were violating the civil rights of the Plaintiff.

5. The CITY OF SPRINGFIELD, Clark County, Ohio, is a municipal corporation and government subdivision of the State of Ohio of which the SPRINGFIELD CITY POLICE DEPARTMENT is a part thereof.

6. The COUNTY OF CLARK, STATE OF OHIO, by and through the Clark County Board of County Commissioners is a governmental subdivision of the State of Ohio of which the Clark County Sheriff's Department is a part.

7. The Defendant, STEPHEN A SCHUMAKER, at all times material hereto was employed by Clark County, State of Ohio, as the Prosecuting Attorney. This action is being taken for his wanton, willful, reckless, and/or negligent misconduct both in his capacity as the Prosecuting Attorney wherein he enjoys qualified immunity, and outside the conduct of his office as Prosecutor for conduct was taken negligently, recklessly, wantonly, or willfully outside the scope of his employer.

8. The Defendant, DR. WALTER LAWRENCE, is a medical doctor licensed to practice medicine in the State of Ohio and, as such, was in charge of delivering medical care and treatment in the Clark County Jail at all times relevant to the case at bar, and in particular, responsible to deliver the appropriate care and treatment to the Plaintiff in the case at bar. Dr. Lawrence is sued in his capacity as an employee of Clark County, Ohio, and individually for his conduct as hereinafter alleged.

9. The Defendant, SHERIFF GENE A. KELLY, was at all times pertinent hereto in charge of the Clark County Jail, in charge of the prisoners incarcerated therein, including the Defendant from September 8, 1988 to January 4, 1989, responsible for their care, treatment, control, as well as providing of all appropriate medical services. It was directly

by the Defendant, Gene A. Kelly, that the Plaintiff was falsely incarcerated, imprisoned, and prosecuted as hereinafter set fourth. Sheriff Kelly is sued as an individual and in his capacity as the County Sheriff.

10. The Defendant, ROGER EVANS, was the Chief of Police of Springfield, Ohio, and directly in charge of the issuance of warrants, conducting any line-ups, the pre-arrest investigation, investigation, prosecution, and incarceration of the Plaintiff from sometime before September 8, 1988 to January 10, 1989 when an Entry of Dismissal was journalized in the Clark County Court of Common Pleas. Roger Evans is sued individually and in the capacity as Chief of Police.

11. The Defendants, SGT. ROBERT MARCUM, DET. RONALD MENDAH, AND DET. ROBERT KERR were at all times acting as police agents, and were acting both in the scope of their employment as police officers for the City of Springfield, Ohio and outside the scope of their employment when certain critical information became known to them and they failed to disclose same intentionally or in deliberate indifference to departmental policy and the law of Ohio for purposes of preventing, ceasing, or ameliorating the unlawful conduct toward the Plaintiff as hereinafter alleged. These people are sued both in their capacity as police officers and individually.

12. The conduct of the Defendants complained of hereinafter was done under the color of state law and reason of governmental authority pursuant to statue, ordinance, custom and usage. However, some of the conduct was outside of their authority pursuant to state law, state and

governmental authority and, as such, they are individually liable, as well as liable in their capacity as public officers. Some of the aforesaid statues, policies, and customs are as follows:

A) Failure to observe the Springfield City Policy, departmental rules, regulations, policies, and customs, as well as the statutory and case law for:

1) investigation of criminal conduct;

2) obtaining and alleging information to establish probable cause for a search warrant, including independent objective investigation to determine the truth of any informant's information or conclusionary statements of truth by others;

3) reviewing defendants statements and alibis for truthfulness as part of the investigatory procedures;

4) conducting photographic spreads and identifications through photographs;

5) line-ups and in-person identification of potential defendants by victims of crimes;

6) failure to follow investigatory procedures and to follow up investigations after arrest, including reviewing statements favorable to defendant, and alibi information;

7) failure to process critical forensic information and tests (including DNA matters) within a reasonable time;

8) for completely ignoring or, showing a willful indifference to evidence of innocence.

B) Violation of Ohio Revised Code §§2933.22, et seq; 2935.01, et seq; and Ohio Rules of Criminal Procedure, Rules 4 and 41;

C) Violation of Ohio Revised Code §§5120.10, et seq; 341.07, et seq; and the Ohio Administrative Code Sections 5120:1-7-01 et seq; (and, in particular, §5120:1-8-09);

D) Violation of policies, procedures, and customs of the Clark County Sheriff and the employees of Clark County jail for willfully and/or indifferently failing to provide medical care to the Plaintiff over his entire incarceration even though they knew of his medical needs;

E) Violation by Dr. Lawrence, both independently as a physician and as an employee of Clark County, of the accepted and recognized standard of care for medical treatment of the Plaintiff;

F) For the willful indifference and on-going violation of policies, procedures, regulations, State law (statutorily, and by administrative code) of medical health standards toward the Plaintiff which were known, or should have been

known, to Clark County, the Clark County Sheriff, and employees of the Clark County Sheriff's Department;

G) For the Defendant, willful indifference to medical treatment and follow-up care as indicated by the Plaintiff's treating physician, Dr. Barre;

H) For the Defendant, Prosecutor's, willful indifference to all the evidence presented to him to prove the Plaintiff innocent and his failure to timely dismiss charges thereupon, as well as the misuse of Plaintiff's circumstances for political advantage contrary to 7-103 of the Code of Professional Responsibility as promulgated by Ohio Supreme Court and as a minimum standard of care, custom and care owed to an accused.

13. At all times in the case at bar the Defendants were domiciled in Clark County, Ohio.

14. All causes of action arising under state law either statutorily or by common law, are grounds set fourth for relief hereinafter pursuant to the pendent jurisdiction of this Court.

15. At all times relevant to the matters alleged hereinafter, the Plaintiff was a citizen of the United States of America, without disability relating to his citizenship, and thereby entitled to all the privileges and immunities thereto.

FIRST CAUSE OF ACTION

16. Plaintiff alleges each and every allegation contained in paragraphs one (1) through fifteen (15) as if fully rewritten herein.

17. At all times material hereto, STEPHEN MICHAEL RIDDER, was a resident of Clark County, Ohio, and was entitled to exercise his rights as a citizen of the State of Ohio and United States without fear of unlawful detention, incarceration, malicious prosecution, wrongful arrest, denial of his constitutional rights, subjection to cruel and unusual punishment, and denial of appropriate medical care and treatment.

18. Some of the acts of the Defendants set forth hereinabove were under the color of law and pretense of statutes, ordinances, customs, and usages of the State of Ohio, as alleged heretofore, and under the authority of the offices that they held.

19. The aforesaid conduct was either done with total indifference as to the constitutional rights of the Plaintiff and/or the Defendants acted in such manner that was contrary to any reasonable person in their position because they knew, or should have known, that they were violating Plaintiff's constitutional rights.

20. On or about September 7, 1988, the Defendants wrongfully, unlawfully, untruthfully, without probable cause and with actual malice, caused a search warrant to be issued alleging that the aforesaid Plaintiff was a rapist and guilty of certain criminal conduct. A copy of the aforesaid search

warrant is attached hereto and incorporated herein as if fully rewritten as Exhibit "1".

21. The search warrant was issued in violation of the Plaintiff's constitutional rights under the fourth, Fifth, and Fourteen Amendments, as well as contrary to the statutory law, policies, customs, and procedures as aforesaid (referring to paragraph 12, supra).

22. The search warrant was defective, not only in that it lacked probable cause, but that the Defendant, affiant, failed to investigate any of the allegations

23.The information available to the Defendants but deliberately ignored included the following):

A) That on or about January 5, 1986, the date of the first alleged crime, the Plaintiff was incarcerated in Ockeechobee, Florida, pursuant to the attached Exhibit "2", an FBI NCIC arrest record, which was available to Defendants. Plaintiff also advised said Defendants of this information but was ignored;

B) That Mike Rutherford of 2033 Villa Road, Springfield, Ohio, lived with Steve Ridder at 136 S.E. 68th St., Ockeechobee, Florida on January 5, 1986, both before and after such date and, in particular on January 5, 1986. That Mike Rutherford resided with Bob Mosier at the time the police questioned (July-September, 1988) and they did not question him about this information when they question Mosier, further, even after the police were provided with same, they were ignored;

C) The Defendants failed to obtain to obtain any information Plaintiff's concerning residence and employment at the time of the alleged criminal incidents even though it was readily available to them. Further, even after learning said exculpatory information, the Defendants ignored it. The information available to them discloses:

1) 1984 to March 1986. Plaintiff lived at 136 S.E. 68th Ave., in Okeechobee, Florida. Was with ex-wife until June of 1984. Mike Rutherford lived with him from Oct./Nov. 1985 until Feb./Mar 1986. He sold the house in March, 1986 as part of his divorce;

   Rutherford now lives at 2033 Villa Rd., Springfield, Ohio with Bob Moiser.

   During this time Plaintiff worked for U.S. Sugar Corp. in Bellglade, Fla. as a laborer and foreman, as a ranch hand in Okeechobee for George Goodfellow, and as a house builder for Wesley (lnu) who also worked on the ranch;

2) March 1986 to May 1986. Lived with Jeanie Baker in Okeechobee in a condominium. She owns Hairstyles by Autumn.

   Plaintiff worked for Browns Bros. Equipment in Juniper, Florida. Had a hernia operation in February, 1986 (hospital records available)

3) May 1986 to Jan. 1987. Plaintiff lived with brother, Gary, on Wood Road in Dewitt, MI. Worked for him in landscape business;

4) Jan. 1987 to April 1987. Plaintiff lived in Mason Michigan in a housed owned by his brother, Gary and worked for Gary during this time;

5) Apr. 1987 to May 1987. Plaintiff was traveling through Springfield to visit family in Florida when he was offered a job by Pete Collier. He moved in with Rutherford and Moiser at 2033 Villa Rd. for 3-4 months.

From Apr. 1987 to Nov. 1987, Plaintiff worked for Bob Moiser who owns Lawnmasters, a lawn care company.

6) Mid 1987 to July 1988. Plaintiff lived on Lexington Ave., Springfield with Gayle Poppey and worked for Collier Roofing Company;

7) Feb. 1987 to July 1988. Plaintiff went to work for Collier. Cut his hand in July and hasn't worked since;

8) July 1988 to present. Lived with Becky Garrity at current address (See, Exhibit #3, attached).

D) Therefore, any and all information available to the Springfield Defendants, upon any reasonable inquiry, would have eliminated the Plaintiff as a potential suspect. The said

Defendants failed to so investigate said information both prior to the issuance of the search warrant and afterwards.

E) The affidavit fails to establish any reliability or credibility of the informant who supplied hearsay and hearsay upon hearsay information. No independent investigation was undertaken whatsoever by Defendants to corroborate the inaccurate information.

F) No "duck tape" was carried on trucks which were used by Lawn Master, as stated by Bob Moiser, who also owned the company. The police knew or should have asked him, as the owner. Certainly, this misinformation by an "informant" is not in conformance with search warrant information requirements.

G) The pre-search warrant photographic display was unlawful, inconsistent with policy and procedures, and was not only unreliable for purposes of obtaining a search warrant, but also tainted the subsequent "line-up" and identification procedure used after arrest.

H) Kim Carr's voice and photographic identification was totally unreliable and any reasonable investigation would have disclosed same.

I) The allegation that Plaintiff had received mental health treatment was erroneous. This was easily verifiable as false.

J) The allegations concerning women, masturbation, and general allegations of sexual misconduct were unsubstantiated, untrue, and without probable cause.

K) Further, Ron Lockwood of the Springfield News called to the attention of the Springfield officers and Mr. Schumaker, the above true facts after the search warrant was issued and was promptly ignored.

24. As a direct and proximate result of the filing of the aforesaid search warrant without probable cause, the Plaintiff was subjected to unlawful searches and seizures of his person and property and caused to be arrested.

25. At all times material hereto the Defendants had information, or had information available upon reasonable inquiry, that would indicate that the Plaintiff had an alibi for many of the acts alleged in the search warrant, being out of the State, and that much of the information was totally false, but instead sought the issuance of the search warrant regardless.

SECOND CAUSE OF ACTION

26. Plaintiff realleges each and every allegation contained in paragraphs one (1) through twenty-five (25) as if fully rewritten herein.

27. On or after September 7, 1988, as a result of the aforesaid improper investigation and improper and unlawfully issued search warrant, the Plaintiff was caused to be arrested and indicted on fourteen (14) counts. The arrest warrant is attached as Exhibit 4 and incorporated herein as if fully rewritten. The indictment is attached hereto as Exhibit 5 and

incorporated herein as if fully rewritten and sets forth the fourteen (14) counts.

28. The aforesaid indictment was issued unlawfully, untruthfully, and with reckless indifference to law, and procedure, and with actual malice, alleging that the Plaintiff had been guilty of the various state crimes. No reasonable law enforcement officer would have arrested the Plaintiff, or even obtained a search warrant, based upon the information available and investigation done as of September 7, 1988. Further, any reasonable officer would have known he was violating the constitutional rights of the Plaintiff.

29. Prior to September 7, 1988, and thereafter the Defendants (Evans, Marcum, Mendah, and Kerr) continued to investigate the aforesaid Plaintiff and his acts, conduct, and whereabouts during the alleged crimes. The Defendants had available to them information that he was not even in the State on some of the alleged dates but recklessly ignored same; they also obtained information that pursuant to DNA testing that he could not be guilty of the crime and even after that became known to them, they continued to incarcerate him for an even further length of time. This information was supplied to the Police by Beck Garrity (an employee of the Clark County Sheriff's Department), Donnie Robinson, 305 Mechanicsburg Rd., Springfield, Ohio 45503; Gary Williams, 65 Center Str., Springfield, Ohio 45505, Larry and Sharon Dillon of Springfield, Ohio (address given by Beck Garrity) and others. The Springfield Defendants either refused to obtain and corroborate same. Said Defendants were totally indifferent to said information.

30. The aforesaid Defendants further failed to investigate the Plaintiff's whereabouts, alibis, and other physical information which proved his innocence. Said acts and omissions were to, and totally ignored by Defendants, Evans and Schumaker, even though it was their duty pursuant to State law to actively supervise the investigation and prosecution of Plaintiff's case.

31. The aforesaid conduct violated the constitutional rights of the Plaintiff under the Fourth, Fifth, Eighth, and Fourteenth Amendments, and was a violation of 42 U.S.C. §1983.

32. Further, the Defendants, City of Springfield and Clark County, were liable as the governmental entity under which the conduct of the individual Defendants claimed color of state law.

THIRD CAUSE OF ACTION

33. Plaintiff realleges each and every allegation contained in paragraphs one (1) through thirty-two (32) as is fully rewritten herein.

34. Thereafter, the Defendants sought and obtained an extremely high bond without probable cause, causing the Plaintiff to be unnecessarily incarcerated during the pendency of his criminal prosecution.

35. The unreasonable bond was a violation of the Plaintiff's constitutional rights pursuant to Articles IV, V. VIII, and XIV, and under O.R.C. §2937.22, and O.R. Crim. p. 46, as well as 42 U.S.C. §1983.

36. The Defendant, Schumaker, was totally and willfully indifferent to the bond requested, and, in fact, requested same, knowing it to be unreasonable under the circumstances or being in a position to know that no reasonable prosecutor would have sought such a bond under the circumstances.

FOURTH CAUSE OF ACTION

37. Plaintiff realleges each and every allegation contained in paragraphs one (1) through thirty-six (36) as if fully rewritten herein.

38. Thereafter, the Defendant, Stephen Schumaker, caused great publicity to be made of this arrest and used such publicity in his political campaign to obtain re-election. He did so with actual malice outside the scope of his office and in violation of the Professional Code of Responsibility at 7-103 and 7-107.

39. The conduct of Defendant, Schumaker, was intentional in that he discussed publicly the purported guilt of the Plaintiff for purposes both of his office and outside of his office (political).

40. The aforesaid conduct of Mr. Schumaker was in violation of the Plaintiff's constitutional rights under the V and XIV Amendments, the duty of a prosecutor to the accused and public under DR 7-103 and 7-107, as well as 42 U.S.C. §1983.

FIFTH CAUSE OF ACTION

41. Plaintiff realleges each and every allegation contained in paragraphs one (1) through forty (40) as if fully rewritten.

42. The Defendants, thereafter, also subjected the Plaintiff to unlawful, and improper police line-ups, and had him improperly identified as a potential suspect thereby amassing additional evidence without probable cause, in a reckless disregard of their duties, and without regard to a reasonable inquiry by an objective, reasonable, independent law enforcement officer as required by the duties of their office.

43. The Defendants (all but Dr. Lawrence and the Clark County Defendants) further attempted to obtain improper admissions and statements from the plaintiff and attempted to get him to plead guilty to lesser crimes, or a fewer number of crimes, under a plea bargaining arrangement stating that they would, in fact, see that he would not get treated as harshly if he would do so.

44. All of the aforesaid investigation was biased and designed not to prove the facts of the case, nor to follow any leads that were favorable to the Plaintiff or to show his innocence but, instead, to assure a successful criminal prosecution of the Plaintiff who, in fact, was innocent of any and all charges.

45. Such conduct by the Defendants was done with actual malice and without probable cause and did actual harm to the Plaintiff causing him severe injury which entitles him to compensatory and punitive damages.

46. The Defendants knew, or should have known, that they were unable to conduct a fair and impartial investigation of the Plaintiff after the comments and publicity surrounding same as provided to the news media by the Defendants and, in particular, Stephen Schumaker and they failed to correct their conduct toward the Plaintiff or to, in fact, cease and desist their unlawful conduct.

47. The prosecution and actual incarceration of the Plaintiff continued until January 4, 1989. Attached hereto as Exhibit "6" is a copy of a request for Discovery made by Stephen A. Schumaker wherein it was indicated that this trial was going to proceed and go forward on January 11, 1989. This request is attached hereto and incorporated herein as fully rewritten.

48. The aforesaid Request for Discovery was made after the prosecutor, Stephen A. Schumaker, and the other Defendants knew, as a matter of fact, that the Plaintiff could not possibly have committed the crime because of the DNA testing done. This was later admitted to by the Defendants, but they, instead, were still seeking to obtain some type of plea arrangement or plea agreement whereby the Plaintiff would, indeed, plead guilty.

49. Becky Garrity, an employee of the Clark County Sheriff's Department, has stated that she was told that the DNA results were obtained prior to January 4, 1989.

Further, Plaintiff avers he was told directly and indirectly by the Defendants that the DNA test results would be received much sooner than January 4, 1989.

50. At all times material hereto the Defendants knew, or should have known, that the allegations made against the Plaintiff were false and any reasonable person in the Defendants' position would have known that the Plaintiff's constitutional rights were being violated.

51. In the alternative, at some time during the investigation it became undeniably clear that the Plaintiff was, in fact, not guilty of the crimes and he still was forced to undergo criminal prosecution and remained incarcerated without probable cause and maliciously detained against his constitutional rights under the V, VIII, and XIV Amendments.

52. The conduct of the Defendants, including but not limited to the activities alleged heretofore and stated hereinafter, violated Title 42 of the United States Code, Section 1983 and other related Sections thereunder.

53. As a direct and proximate result of the unlawful conduct of the aforesaid Defendants, as aforesaid, jointly and severally , the Plaintiff suffered a loss of freedom, malicious criminal prosecution, false arrest, false imprisonment, denial of his constitutional rights to be safe and secure in his person and property, denial of his due process rights, denial of his fundamental rights at critical stages of the investigatory and accusatory process, attorney fees for defense, investigative fees, loss of his reputation, defamation to his character, damage to his quality of life, emotional and psychiatric injuries, job loss, wage loss, job endangerment, permanent loss of future economic

opportunities and employment with a permanent diminishment in earning capacity, and other related damages which are permanent.

54. The aforesaid acts, conduct, omissions and behavior of the aforesaid Defendants was performed knowingly, intentionally, recklessly, totally indifferently, and/or maliciously, by reason of which Plaintiff is entitled to an award of punitive damages along with all appropriate damages

SIXTH CAUSE OF ACTION

55. The Plaintiff realleges each and every allegation contained in paragraphs one (1) through fifty-four (54) as if fully rewritten herein.

56. The aforesaid Defendants maliciously, wrongfully, under color of law, and without probable cause, caused the indictment to be issued against the Plaintiff and caused said prosecution to continue against Plaintiff for the crimes as alleged therein.

57. There was indeed a malicious filing of an indictment.

58. There was a lack of probable cause for filing of the indictment.

59. The prosecution has been terminated in favor of the Plaintiff pursuant to attached Exhibit "7" which is an Entry whereby on January 12, 1989, the indictment was dismissed against the Plaintiff.

60. The indictment resulted in the Plaintiff's favor.

61. The unlawful acts of the Defendant caused an actual seizure of the Plaintiff's person during the course of the prosecution.

62. All of the aforesaid acts and conduct resulted in injury and damages to the Plaintiff for which he is entitled to relief in the form of compensatory and punitive damages under State law and pursuant to pendent jurisdiction for malicious prosecution.

SEVENTH CAUSE OF ACTION

63. Plaintiff realleges each and every allegation contained in paragraphs one (1) through sixty-two (62) as if fully rewritten herein.

64. False arrest and imprisonment resulted from the aforesaid conduct of the aforesaid Defendants by which the Plaintiff was deprived of his physical liberty.

65. The arrest was unlawful and made without probable cause by a person who was authorized to make the arrest but had reason to believe, or upon reasonable inquiry would have had reason to believe that the Plaintiff was not guilty of the crime.

66. The arrest was effected under color of law and thereafter the Plaintiff was forced to be incarcerated until January 4, 1989, and subject to prosecution until January 12, 1989.

67. Further, the Plaintiff was caused to be unlawfully falsely imprisoned by his incarceration and, indeed, was continued to be falsely imprisoned as a result of the wrongful conduct of the aforesaid Defendants after they became aware that he was innocent, or after any reasonable person would have become aware of his innocence.

68. As a result of the unlawful conduct of the Defendants, as aforesaid, he Plaintiff proximately suffered damages for which relief is provided under state law in the form of compensatory and punitive damages and for which relief may be granted hereunder, pursuant to pendent jurisdiction.

EIGHTH CAUSE OF ACTION

69. Plaintiff realleges each and every allegation contained in paragraphs one (1) through sixty-eight (68) as if fully rewritten herein.

70. The indictments were returned without any reliable investigation and were returned based upon conduct of the aforesaid Defendants which fell well below the usual, customary standards of their office, and indeed in contravention thereof, or of any other similarly situated office holders in the jurisdiction of this Honorable Court.

71. The issuance of said indictment was not only done maliciously and without probable cause but was an abuse of the criminal process and in direct contravention to the rights of the Plaintiff pursuant to the law and constitutions of the State of Ohio and the United States of America.

72. Thereunder, under this investigation, the Defendants did jointly and severally, under color of their office and, at times, outside the color of their office do the following inappropriate activities:

(A) Fail to obtain a warrant upon probable cause;

(B) Improperly used a photographic display;

(C) Improperly conducted police line-ups;

(D) Improperly took statements from the Plaintiff and witnesses;

(E) Failed to follow-up alibis, defenses, and other available information that showed the innocence of the Plaintiff;

(F) Failed to review any and all evidence of mitigation including, but not limited to the DNA reports and FBI NCIC arrest reports in a timely and appropriate manner;

(G) The Defendant, Stephen Schumaker, inappropriately, maliciously, and without probable cause, used the unfortunate circumstances of the Plaintiff improperly to his benefit for political purposes and in violation of his professional responsibilities both privately and politically;

NINTH CAUSE OF ACTION

73. Plaintiff realleges each and every allegation contained in paragraphs one (1) through seventy-two (72) as if fully rewritten herein.

74. Prior to September 7, 1989, the Plaintiff had suffered a grievous injury to his hand and was trying to recover from what was a very serious, obvious, and apparent injury.

75. All the Defendants knew of this medical condition. See attached Exhibit 8, which is a medical receiving form for Plaintiff received by Defendants.

76. While the Plaintiff was incarcerated he requested medical treatment in e form of follow-up therapy and treatment for his hand by his treating physician, Dr. Barre and Miami Valley Hospital physical therapy department. He had suffered the injury as a result of a saw but needed physical therapy on a regular basis in order to recover to as great an extent as possible, the use of the aforesaid hand.

77. The Plaintiff was also in need of immediate further surgeries to his ankle, leg, and hand in order to transplant tissues from his lower extremity to his hand. Time is of the essence in these procedures.

78. The Defendants, City of Springfield, Evans, Marcum, Mendah, Kerr, and Schumaker, knew of this medical condition and the failure to treat by all other Defendants, and resulting additional aggravation and further injury, as the proximate result of the other Defendants' acts, as hereinafter averred, is also a proximate result of the Defendants, Springfield, Evans, Marcum, Mendah, Kerr, and Schumaker, joint and several acts independent and jointly with all other acts and omissions by the other Defendants.

79. Upon incarcerating the Plaintiff in e Clark County Jail, the Clark County Sheriff, Gene A. Kelly, Dr. Walter Lawrence, and Clark County, Ohio had a duty to render to him adequate medical care pursuant to state law (See, paragraph 12).

80. That through the incarceration of the Plaintiff, he required constant, timely, and adequate medical care, surgery, physical therapy, exercise, medication, and other treatment for both his hand, leg, and ankle.

81. That throughout the incarceration, Dr. Barre made known the treatment and follow-up care to the Defendant, Dr. Lawrence and Sheriff Kelly, as did the Plaintiff himself.

82. That even though the aforesaid Defendants knew, or should have known, of the medical condition of Plaintiff upon incarceration, the surgery subsequent thereto, and the appropriate care and treatment of the Plaintiff they intentionally, wantonly, and recklessly ignored same which proximately resulted in the loss of function of the Plaintiff's hand, leg, ankle and whole body, causing a permanent disability, pain, suffering, and mental anguish, which is also permanent in nature.

83. Upon being informed of the need for follow-up therapy, the Defendant, Dr. Lawrence, advised the Plaintiff that he would get excellent medical care when he got to prison and not to expect them to take him to Miami Valley Hospital from the Clark County Jail in order to receive treatment. This was stated to the Plaintiff, by the Defendant, Dr. Walter Lawrence, who was acting in the course of and arising out of his employment with Clark County, Ohio, and further was acting independently under his duty and profession as a physician licensed to practice in the State of Ohio.

84. The Defendant, Walter Lawrence, failed to exercise any reasonable degree of care required of a physician of his attainment and failed to provide adequate medical advice, care, and treatment to the Plaintiff and as a result thereof, the Plaintiff has suffered permanent

and grievous injury of a physical nature as well as emotional pain and suffering because of the permanency of the injury.

85. The aforesaid conduct of the Defendant, Dr. Walter Lawrence, under the authority and direction of the Defendant, Clark County, Sheriff of Clark County, Clark County Board of County Commissioners, as well as all other Defendants who had authority and supervisory capacity over him as law enforcement officers and are liable for the failure to provide adequate medical care and treatment to the Plaintiff.

86. After the Plaintiff had been incarcerated for seven (7) weeks, his condition became so bad that they did, in fact, transport him to Miami Valley Hospital where he received medical care which was too little and too late. The subsequent surgeries to the hand failed. Further, the subsequent surgeries to his left ankle and leg failed because of his inability to exercise in his holding cell and the lack of overall follow-up care.

87. The aforesaid conduct constituted cruel and unusual punishment and a deprivation of the rights of the Plaintiff pursuant to Article VIII and XIV of the United States Constitution and 42 U.S.C. § 1983.

88. As a proximate result of the aforesaid unlawful conduct, failure to provide medical treatment, malpractice, cruel and unusual punishment, failure to provide adequate care at a detention facility, as required by State law, as aforesaid (paragraph 12) and the Ohio Constitution, the Plaintiff has suffered severe damages in the form of lost wages, future lost wages, permanent disability, permanent pain, suffering and scarring, and said conditions will continue into the future.

89. The Plaintiff is entitled to relief pursuant to his constitutional violations and 42 U.S.C. § 1983, et seq. in the form of compensatory damages because of the failure of Clark County, the Clark County Sheriff, Dr. Lawrence, and the other Defendants, as aforesaid, to act as any reasonable person in their position as they knew or were completely reckless and indifferent to the fact they were violating the Plaintiff's constitutional rights under color of State law.

TENTH CAUSE OF ACTION

90. Plaintiff realleges each and every allegation contained in paragraphs one (1) through eighty-nine (89) as if fully rewritten herein.

91. The Defendants, Dr. Lawrence, individually, and as an employee of Clark County, and Clark County Sheriff and Clark County, as keepers of the Clark County jail, are sued jointly and severally pursuant to the State causes of action under medical malpractice pursuant to O.R.C. §§ 2305.11 and 2307.42 as to Dr. Lawrence and under the State duties of the other Defendants to provide adequate medical facilities and care to the Plaintiff.

92. That the care, treatment, and follow-up provided to the Plaintiff was below the standard of care for a physician, jail, jailer and county in the State of Ohio.

93. That as to Dr. Lawrence, an affidavit is attached hereto as Exhibit 9, expressing an opinion that the aforesaid Dr. Lawrence was, at the very least, negligence in his care of Plaintiff.

94. That the Sheriff and County failed to properly supervise and control Dr. Lawrence and that their conduct was in violation of State law as aforesaid (paragraph 12) and was, at the very least, negligent.

95. That the conduct of the Defendants, as aforesaid proximately caused the injuries and damages to the Plaintiff.

ELEVENTH CAUSE OF ACTION

96. Plaintiff realleges each and every allegation contained in paragraphs one (1) through ninety-five (95) as if fully rewritten herein.

97. The Springfield Defendants and Mr. Schumaker (excepting, Dr. Lawrence, Sheriff Kelly, and Clark County), jointly and severally, issued written and verbal statement asserting that the Plaintiff was guilty of the many crimes for which he was indicted and that he was an [sic] indeed an infamous rapist, and that he would be subject to continued criminal prosecution and incarceration.

98. The Defendants maliciously published, or knew these defamatory statements would be published or republished, to third persons including, but not limited to, the general public and other parties.

99. As a result of the aforesaid malicious publications virtually every person in he jurisdictional area of this Court became aware through radio, newspapers, television and personal statements that the Plaintiff was accused of being a rapist and criminal. There was no doubt that these reverences were made toward the Plaintiff and that these statements, written and oral, were untrue.

100. All the aforesaid material was false, or should have been known to be false, and was made maliciously. Upon reasonable inquiry there would have been no reason to have made the aforesaid publications.

101. The aforesaid publications were libelous and slanderous per se and the Plaintiff is entitled to compensatory damages for harm to his employment, damages to his future employment, damages to his relationships with others, damages to his general reputation and home life.

102. As a direct and proximate result of the aforesaid false and malicious statements published by Defendants, the Plaintiff is also entitled to punitive damages.

103. Some of the aforesaid false and malicious statements were made by Stephen Schumaker in order to promote his public career, and in violation of the Code of Professional Responsibility, thereby being unprivileged as being in malicious and reckless disregard of the truth.

TWELFTH CAUSE OF ACTION

104. Plaintiff realleges each and every allegation contained din paragraphs one (1) through one hundred and three (103) as if fully rewritten herein.

105. The Springfield Defendants, as aforesaid, engaged in reckless, wanton, malicious, and/or intentional conduct submitting the Plaintiff herein to an unfair investigation and unfair deprivation of his due process of law.

106. As a proximate result of said investigation the Plaintiff was subjected to false arrest, false imprisonment, abuse of process, and malicious prosecution, as well as other improper conduct toward him.

107. The aforesaid conduct on the part of t defendants was malicious and in wanton disregard of the Plaintiff's rights.

108. As a direct and proximate result of Defendants intentional and/or reckless and/or malicious misconduct, the Plaintiff has suffered severe emotional distress.

109. Said severe emotional distress is permanent in nature and entitles Plaintiff to both compensatory and punitive damages.

THIRTEENTH CAUSE OF ACTION

110. Plaintiff realleges each and every allegation contained in paragraphs one (1) through one hundred and nine (109) as if fully rewritten herein.

111. The Defendants' activity was in consultation with each other and they acted in concert with each other and were mutually aware of information available which indicated that the Plaintiff was being inappropriately incarcerated, prosecuted, unlawfully denied medical treatment, and subject to the aforesaid other illegal acts.

112. All the aforesaid Defendants acted in concert with the other and with knowledge of whether the other knew or, should have known what other information was available to each other. As such, such constituted conspiracy to deprive the Plaintiff of his rights under the Ohio and United States constitutions, State law, and 42 U.S.C. § 1981 et seq. (including 42 U.S.C. § 1988).

WHEREFORE, Plaintiff demands judgment jointly and severally against the Defendants for TEN MILLION DOLLARS ($10,000,000.00) in compensatory damages and TEN MILLION DOLLARS ($10,000,000.00) in punitive damages together with pre-

judgment interest, post judgment interest, the Plaintiff's reasonable attorney fees and costs, and for all other relief to which he may be deemed entitled either at equity or at law.

/s/ Dwight D. Brannon
Dwight D. Brannon
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/s/ Jose M. Lopez/DDB
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JURY DEMAND

Plaintiff respectfully demands a trial by jury on all issues contained herein.

BRANNON, HALL & TUCKER

/s/ Dwight D. Brannon
Dwight D. Brannon
Attorney for Plaintiff

/s/ Jose M. Lopez/DDB
Jose M. Lopez
Attorney for Plaintiff

AFFIDAVIT

STATE OF OHIO)
) SS:
COUNTY OF MONTGOMERY)

STEPHEN MICHAEL RIDDER, being first duly cautioned and sworn according to law deposes and says that the foregoing acts are true and correct to the best of his knowledge.

Further affiant sayeth naught.

/s/ Stephen Michael Ridder
STEPHEN MICHAEL RIDDER

Sworn to before me, a Notary Public, and subscribed in my presence this 1st day of October, 1990.

/s/ Tammy Howard
Notary Public

TAMMY HOWARD, Notary Public
In and for the State of Ohio
My Commission Expires April 26, 1993

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by mailing a copy of same regular U.S. Mail, this 1st day of October, 1990:

Joseph R. Butz
Attorney for Defendants,
The City of Springfield,
Roger Evans, Roger Marcum,
Ronald Mendah, and Robert Kerr
806 Arcue Building
Springfield, Ohio 45502

John F. Haviland
Attorney for Defendant,
Lawrence
400 Gem Plaza
Dayton, Ohio 45402

Bradley L. Snyder
Attorney for Defendant,
Schumaker
37 W. Broad St.
Columbus, Ohio 43215

Clark County Board of Commissioners
120 N. Fountain Ave.
Springfield, Ohio 45502

Sheriff Gene A. Kelly
120 N. Fountain Ave.
Springfield, Ohio 45502

BRANNON, HALL & TUCKER

/s/ Dwight D. Brannon
Dwight D. Brannon
Attorney for Plaintiff

Exhibits Not Attached To This Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STEPHEN M. RIDDER	* CASE NO. C-3-90-003
Plaintiff	* (Magistrate Judge Merz)
vs.	*
CITY OF SPRINGFIELD, OHIO, et al.	* MEMORANDUM OF LAW
	* (Filed December 4, 1990)
Defendants	

I. INTRODUCTION

Pursuant to the Scheduling Order of this Court filed November 21, 1990, Plaintiff submits the following information:

A. First Cause of Action

The Plaintiff, Stephen M. Ridder, brings this cause of action pursuant to federal law, specifically, 42 U.S.C. §1983 and §1985.

This Court has subject matter jurisdiction over the federal questions presented.

Under this cause of action, the Plaintiff alleges that the investigating officers from the City of Springfield, Sgt. Robert Marcum, Det. Ronald Mendah, and Det. Robert Kerr, individually and in their capacities as Springfield City Police Officers violated the Plaintiff's constitutional and civil rights by conspiring together and obtaining a search warrant all in violation of Plaintiff's constitutional

rights. The gravamen of this factual allegation lies in the fact that the police officer/Defendants, as well as the Chief of Police, Roger Evans, acting in his capacity as Chief of Police for the three officers in question, acted in such a manner that a jury can reasonably conclude that they acted in total indifference to the constitutional rights of Plaintiff, or that they were knowingly violating the Plaintiff's constitutional rights. The claims against these four Defendants also pertain to the fact that they gave false information so as to obtain a search warrant and acted with actual malice.

The case authority under which the Plaintiff rests his cause of action includes, but is not limited to, the following cases: Monroe v. Pape, 366 U.S. 167, 81 S Ct. 473 (1962); Tennessee v. Garner, 471 U.S., 105 S. Ct. 1694 (1985); Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973), cert. denied, 414 U.S. 1033; Graham v. M.S. Conner, 109 S. Ct. 1965; 104 L. Ed. 443 (1989); Nishiyama v. Dickenson Co. Tennessee, 814 F.2d 277 (6th Cir. 1987); Rochin v. California, 342 U.S. 165 (1952); Parratt v. Taylor, 451 U.S. 527 (1981); 1946 St. Clair Corp. v. Cleveland, 49 Ohio St. 3d 33 (1990); and Baker v. McCollan, 443 U.S. 137 (1979).

B. Second Cause of Action

The Plaintiff, Stephen M. Ridder, brings this cause of action pursuant to federal law, specifically, 42 U.S.C. §1983.

This Second Cause of Action was another violation of the Plaintiff's civil rights. This violation, as all others occurred within Clark County, State of Ohio.

The subject matter jurisdiction of this Honorable Court lies within the question of federal law presented.

The Defendants to be adjudicated liable under this cause of action include the four Defendants named in the First Cause of Action. Additionally, Clark County, by and through its Commissioners, as well as its Prosecutor, Stephen Schumaker, as well as the City of Springfield are to be held to account for the improper actions which were taken under the color of state law against this Plaintiff. The factual allegations pertain to the filing of a multi-count indictment without proper investigation. The cases cited in support of the Plaintiff's First Cause of Action also support his Second and Third Causes of Action.

C. Third Cause of Action

The Third Cause of Action is brought pursuant to federal law, to-wit: 42 U.S.C. §1983, the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, Ohio Criminal Rule 46, and Ohio Revised Code §2937.22.

The gravamen of this complaint pertains to the Defendant police officers, Defendant prosecutor, Schumaker, Clark County, and the City of Springfield, as these individuals were able to convince the court before whom they appeared, to set an unreasonably high bond without probable cause. The setting of an extraordinarily high bond, $185,000.00, was calculated to keep the Plaintiff herein incarcerated for a period of time, up to and including his release pending the dismissal of the charges or his acquittal by a duly impaneled jury.

D. Fourth Cause of Action

The Fourth Cause of Action is pursuant to federal law, particular 42 U.S.C. § 1983, as well as the Fifth and Fourteenth Amendments to the United States Constitution.

The sole Defendant in this cause of action is Defendant, Schumaker, who intentionally and maliciously created unnecessary publicity regarding the Plaintiff's arrest and indictment. This Defendant, Schumaker, was in a re-election campaign and was able to use the Plaintiff's situation as fodder for his campaign. Plaintiff further claims that Defendant, Schumaker, violated his professional code of ethics, both as a licensed practicing attorney as well as the ethics governing prosecuting attorneys.

E. Fifth Cause of Action

The Fifth Cause of Action is brought under federal law, particularly 42 U.S.C. §1983, §1985, §1985, and §1988.

Under this cause of action, the Defendant, officers, Marcum, Mendah, and Kerr, with the blessing and sanctions of Defendant Kelly, as sheriff of Clark County and Roger Evans, as Chief of Police of the City of Springfield, Ohio, proceeded on a course of conduct whereby the Plaintiff was denied his constitutional rights, as guaranteed by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

Particularly, the improper conduct of the officers surrounded the improper investigation of the Plaintiff, improperly placing the Plaintiff in a police line-up, not following correct and unlawful procedures regarding a criminal investigation, using unnecessary force and coercion to have the Plaintiff plead guilty to a crime he did not commit, failing to disclose relevant and pertinent facts which would lead to the Plaintiff's exoneration, withholding relative and important information from Plaintiff and his legal counsel until all hopes of coercing the Plaintiff into making a confession to a crime he did not commit were exhausted, and subjecting Plaintiff to the most cruel

emotional and physical stress one can possibly think of in these United States.

Cases which are relevant for this Court to review are Smith v. Wade, 461 U.S. 30 (1982); Memphis Community School District v. Stachura, 477 U.S. 299 (1986); Moran v. Johns-Manville Sales Corp., 691 F. 2d 811 (6th Cir., 1982); and Saberton v. Greenwald, 146 Ohio St. 414 (1946).

G. Sixth Cause of Action

The Sixth Cause of Action is based upon state law for malicious prosecution. The federal court jurisdiction is requested pursuant to the pendent rule doctrine.

The Defendants accused of malicious prosecution in this cause of action include the Clark County Prosecutor, Schumaker and Clark County, by and through its Commissioners.

This cause of action is one for malicious prosecution.

Legal citations in support of this cause of action include Portis v. Trans Ohio Savings Bank, 46 Ohio App. 3d 69 (1988); Rogers v. Barbera, 170 Ohio St. 241 (1960); and, Melanowski v. Judy, 102 Ohio St. 153 (1921).

H. Seventh Cause of Action

The Seventh Cause of Action is filed pursuant to federal law found at 42 U.S.C. §1983, §1985, and §1986.

The gravamen of this allegation of false arrest and false imprisonment is against the three Springfield Police Officers, the Chief

of Springfield Police, the Clark County Prosecutor, Schumaker, Clark County, by and through its Commissioners, and the Clark Count Sheriff, Gene Kelly, as he was in charge of the institution wherein the Plaintiff was housed against his will and in violation of the law.

Case authority under this cause of action includes Henry v. U.S., 361 U.S. 98 (1959); Mitles v. Young, 59 Ohio App. 2d 287 (1978); and Mullins v. Rinks, 27 Ohio App. 2d 45 (1971). See, also, Preston v. Murty, 32 Ohio St. 3d 334 (1987).

I. Eighth Cause of Action

The Eighth Cause of Action is brought pursuant to federal law, particularly, 42 U.S.C. § 1983.

The crux of this cause of action pertains to the abuse of process by Clark County, by and through its Commissioners, Prosecutor, Schumaker, City of Springfield, by and through its officers, Kerr, Mendah and Marcum, as well as the officers' Chief of Police, Evans. The facts pertaining to this abuse of allegation are similar to the allegations contained in the Fifth Cause of Action.

J. Ninth Cause of Action

The Ninth Cause of Action is brought pursuant to federal law, particularly 42 U.S.C. § 1983, et seq., as well as the Eighth and Fourteenth Amendments of the United States Constitution.

This cause of action pertains to the cruel and unusual punishment set upon Plaintiff by the failure of Gene Kelly, as Clark County Sheriff and andminister [sic] of the jail, to allow proper medical attention to be administered to Plaintiff In addition to the Clark County Sheriff, Kelly, Clark County, by and through its Board of

Commissioners as well as Dr. Walter Lawrence are to be adjudicated as liable for failure to render adequate medical care. Plaintiff alleges that his medical condition was known to the Defendants at the time he was initially placed in custody and that by withholding proper medical care, physical therapy, medication, and treatment, his punishment was cruel and unusual and in violation of his civil rights.

K. Tenth Cause of Action

The Tenth Cause of Action is filed pursuant to state law and presents a claim for medical malpractice against Dr. Walter Lawrence, individually, and as an employee of Clark County, the Clark County Sheriff's Office, and Clark County, by and through its Commissioners as keepers of the Clark County Jail.

These three individuals, pursuant to state law, are charged with the medical care and treatment of the Plaintiff. Under state law, there was a deviation from the standard of medical care provided to the Plaintiff. Pursuant to state law, an affidavit of a physician is necessary to state a cause of action and such an affidavit was attached to the Amended Complaint as Exhibit "9".

The allegations in this Tenth Cause of Action are that the Sheriff and County failed to properly supervise and control Dr. Lawrence and that their conduct amounted to a violation of law in that, as health care providers they had a duty to refrain from medical negligence.

Legal authorities in support of this cause of action, as well as the Ninth Cause of Action, include Meinze v. Holmes, 40 Ohio App. 3d 143 (C.A. Hamilton Co., 1987); Bruni V Tatsumi, 46 Ohio St. 2d 127, 75 Ohio Op. 2d 184 (1976); and Findley v. United States, 314 F. Supp. 905 (N.D., Ohio), 28 Ohio Misc. 1, 55 OO 2nd 182 (1970).

L. Eleventh Cause of Action

The Eleventh Causes [sic] of Action is based upon state law concerning the action of defamation. This state claim is levied against Defendants, Schumaker, Evans, Marcum, Mendah, and Kerr.

The Plaintiff requests that the court accept this cause of action pursuant to the pendent rule doctrine.

The Defendants allegedly accused the Plaintiff in a public forum of a serious crime, to-wit: rape and kidnaping [sic]. There is no doubt that these statements were made both written and orally and were untrue. Further, it is alleged that Defendant, Schumaker, made these statements in an effort to bolster his re-election campaign and his public career as a prosecutor.

Legal citations in support of this proposition of law include Matalka v. Lagemann, 21 Ohio App. 3d 134 (Franklin Co., 1985); and Rainey v. Shaffer, 8 Ohio App. 2d 262, 8 OBR 354 (1983). See, also, Landsdowne v. Beacon Journal Pub. Co., 32 Ohio St. 3d 176 (1987).

M. Twelfth Cause of Action

The Twelfth Cause of Action is based upon the violation of federal law, to-wit: 42 U.S.C. § 1983 by the City of Springfield police officers and the Chief of Police, Evans.

The allegations are that officers Mendah, Marcum, and Kerr engaged in a course of conduct under color of state law and in violation of Plaintiff's constitutional rights to be free from false arrest, false imprisonment, abuse of process, and malicious prosecution. This cause of action demands restitution for the intentional infliction of

serious emotional distress, for both compensatory and punitive damages.

The cases of law pertaining to this theory include Yeager v. Local Union 20, 6 Ohio St. 3d 369 (1983); Foster v. McDevitt, 31 Ohio App. 3d 237 (CA, Montgomery Co., 1986); Ueblacker v. Cincom Systems, Inc., 48 Ohio App. 3d 268 (1988); and Yingkau v. Dean Witter Reyonds [sic], 628 F. Supp. 23 (S.D., Ohio, 1983).

N. Thirteenth Cause of Action

The final cause of action enumerated in Plaintiff's Complaint pertains to a violation of federal law, to-wit, 42 U.S.C. §1983, §1985, and §1986.

In this cause of action it is alleged that all Defendants acted in conspiracy, or in concert with each other or, by their inaction, neglected to prevent the conspiracy from taking place. In the most heinous deprivation of rights, there exists a cause of action for private citizens to seek redress when public officials gather together to plan the destruction of one's life and to plan the re-election of someone to public office. The Plaintiff alleges that this was a total miscarriage of justice which was brought about by the planned and malicious actions of the Defendants.

CONCLUSION

Counsel regrets that he was unable to completely fulfill each and every detailed requirement by providing appropriate case law for each cause of action.

Counsel represents that the Scheduling Order was received during his Thanksgiving holiday and he was unable to devote his full

time and attention to this memorandum of law. Counsel would, therefore, liked to reserve the right to supplement this memorandum with additional case authority on December 11, 1990, the scheduled conference date.

Additional case authority for Plaintiff's positions are found in Exhibits #1-3, attached hereto and incorporated herein. These three exhibits are Supplemental memoranda which will be shortly filed in opposition to the various motions to dismiss which are currently pending.

Respectfully submitted,
DWIGHT D. BRANNON LAW OFFICES

/s/ Dwight D. Brannon

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Exhibits not attached to this appendix.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STEVEN MICHAEL RIDDER	*CASE NO. C-3-90-003
	*(Judge Herman Weber)
Plaintiff	*(Magistrate Merz)
	*
vs.	*
	*MOTION BY PLAINTIFF
CITY OF SPRINGFIELD,	*FOR SUMMARY
OHIO et al.	*JUDGMENT ENTRY OR,
	*IN THE ALTERNATIVE
Defendants	*TO OVERRULE ALL
	*MOTIONS BY
	*DEFENDANT FOR
	*JUDGMENT ON THE
	*PLEADINGS AND TO
	*DISMISS THE
	*COMPLAINT

Filed March 28, 1991

Now comes the Plaintiff, by and through his counsel, and moves this Honorable Court pursuant to Rule 56 of the Federal Rules of Civil Procedure (and in conjunction with Rule 12(B)(6) of the F.R.C.P.), when additional evidence outside the pleading is introduced, to enter Summary Judgment for Plaintiff against Defendants upon the issue of liability for all or, those deemed appropriate, causes of action.

In the alternative, the Plaintiff moves the Court to Dismiss all pending motions of the Defendants to dismiss or for judgment on the pleadings so that the matters presented by Plaintiff may be subject to full discovery and proceed to trial.

Respectfully submitted,

/s/ Dwight d. Brannon
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MEMORANDUM IN SUPPORT

I. FACTS

On July 8, 1988, the Plaintiff, Stephen Michael Ridder, sustained a severe left hand injury in a work related accident involving a chain saw. Plaintiff's left hand was almost completely severed, and required immediate emergency care.

Plaintiff was taken to the Mercy Hospital Emergency Room in Springfield, Ohio. While Plaintiff was being treated for his injuries, Mercy Hospital employee Kim Carr overheard Plaintiff talking to his health care providers. Ms. Carr felt that Plaintiff "sounded like" the individual who assaulted her in 1986, and subsequently notified Springfield area law enforcement officials of this fact.

Plaintiff was subsequently taken to Miami Valley Hospital for surgical treatment on July 9, 1988; and then began a three-times-per-week physical therapy regimen. This continued treatment was require for maximum recovery.

Prior to these dates, several alleged rapes occurred in and around the Springfield, Sidney, and Wapokenta areas, from January 5, 1986 to July 5, 1988. On most of these occasions Plaintiff was not in the State of Ohio.

Based upon alleged victim Carr's statement, and from information supplied by an unidentified, uncorroborated informant who made statements to the effect that the Plaintiff was a potential suspect, the Defendants Springfield Police Chief Roger Evans, Detectives Roger Marcum, Ronald Mendah, and Robert Kerr initiated their investigation of the Plaintiff. Ms. Carr's accounts of the

alleged attempted rapes were as bizarre as are imaginable. See, the investigative reports filed with Affidavit of Emmons.

Said investigation included interviewing the alleged victims, showing the alleged victims photographs of the Plaintiff, and interviewing the Plaintiff's former employer, Bob Mosier of Lawn Master, a lawn care company.

Alleged victims Catherine Davis, Kim Carr, and Terri Tinker were unable to positively identify the Plaintiff as their attacker from the photographs supplied by the Defendant Detectives. This, again, was strange since Ms. Carr had twice observed her attempted attacker.

The Defendant Detectives noted that a specific modus operandi was used in many of the alleged attacks. Many victims had duct tape placed over their eyes and mouth during the attack. The Defendants unidentified, uncorroborated, not reliable informant made statements to the effect that "it all fit", that the Plaintiff worked for a lawn care services in an around where the rapes occurred, that he showed up back in town when the rapes started, and that the rapes stopped after the Plaintiff was "fired from his job with the lawn care company."

This informant led the Defendant Detectives to interview Plaintiff's former employer, Rob Mosier. While the Defendants maintain that a "company official" at Lawn Masters verified that duct tape was carried on the company's trucks, and that Ridder was employed with the lawn care company, traveling throughout the Springfield area, Mr.

Mosier has related to Plaintiff's private investigator that no duct tape is carried on the trucks and Plaintiff was not fired, he was laid off. Further, no duct tape was ever carried on the truck.

This cursory investigation resulted in Defendant Detectives filing multiple complaints against the Plaintiff and a request for a search warrant which was obtained and signed by Judge Gerald F. Lorig.

Defendant Detectives served the search warrant on the Plaintiff on September 8, 1988, at 7:30 a.m., arresting him at his residence in Springfield. Said search warrant included Plaintiff's blood, hair, saliva, and his body and voice to display in a line-up. No other alleged evidence was found at the home. The Plaintiff was taken into custody and transported to the Springfield Police Department.

Upon arrival, the Plaintiff was taken to an interview room, where Defendant Detectives Marcum, Mendah, and Kerr placed a file on the desk in front of him detailing rapes, kidnappings and burglaries, and asked the Plaintiff what he had to say., The Defendants asked the Plaintiff about his whereabouts on specific dates, and then told him that if he would admit to some of the crimes, they would "talk to someone" to try to get the other charges dropped.

The Defendants then asked the Plaintiff to participate in a line-up, to which the Plaintiff consented, believing he would be cleared of all charges. The line-up was apparently pre-arranged, as it was held at approximately 10:30 a.m., and several of the alleged victims were present.

All six participant in the line-up wore jail clothing, but many were dissimilar in appearance to the Plaintiff. Five of the seven alleged victims reluctantly chose the Plaintiff as their attacker, after having seen pictures of the Plaintiff prior to the line-up (upon information and belief at this time). The identifications were later found to be much less tenuous than the Defendants contended after the line-up.

The Plaintiff was taken to a holding cell where he was kept overnight. On the morning of September 9, 1988, the Plaintiff met with Defendant Detectives Mendah and Kerr, and provided them with a verbal and written account of his whereabouts as related to the dates of the alleged attacks as listed on the documents given to him by the Defendants, offering proof of his innocence. The Defendants told the Plaintiff that they were not interested in the information he was supplying. See, Affidavit, Stephen Michael Ridder, which is attached hereto.

On the day of his arrest, the Plaintiff was asked to provide samples of his head hair, pubic hair, saliva, and blood. These samples were obtained by Dr. Timothy Shepard at the Springfield Police Department Lab. The samples were to be used for DNA testing. The Plaintiff did not object and requested an expeditious review.

Plaintiff also provided his medical history at the time of book-in at the jail. Plaintiff noted to jail personnel that he was going to Miami Valley Hospital for physical therapy on his hand on a three-times-per-week basis. This information was logged by the jailer as evidenced by the exhibits attached hereto. All the Defendants knew that he required the continuing medial treatment. Approximately

two weeks elapsed before he was even seen by the jail doctor, Defendant Walter Lawrence, M.D., who examined his left hand.

Defendant Lawrence advised the Plaintiff that the jail "didn't have time" to take the Plaintiff to Miami Valley Hospital for physical therapy, and that he would have to wait until he got to the penitentiary. Nurse Mary McNeer was a witness to this conversation between the Plaintiff and Defendant Lawrence.

On September 9, 1988, Plaintiff was taken before a visiting judge for arraignment. Bond was set at $185,000.00. Several representatives of the area media were present, and subsequently generated reportings to the effect that the "Northern Estates Rapist" had been arrested. Photographs of the Plaintiff were shown in both print and electronic media. This information was being disseminated by the Defendants, including Stephen Schumaker. At this time, public defender Ron Morris as appointed to represent the Plaintiff.

The Plaintiff met with public defender Morris on several occasions in the jail. Plaintiff repeatedly requested to take a polygraph to prove his innocence. Public defender Morris advised the Plaintiff to wait until the results from the DNA testing were received from the testing laboratory.

A grand jury indictment was filed on September 20, 1988 by Defendant Clark County Prosecutor, Stephen Shumaker, charging Plaintiff with 14 counts: 2 counts kidnapping, 2 counts attempted rape, 4 counts rape, 4 counts

aggravated burglary, robbery, and felonious sexual penetration.

After the indictment, Plaintiff's bail was reduced to $50,000.00, and Plaintiff was able to raise that amount. However, Plaintiff was contacted by public defender Morris, who advised Plaintiff that Defendant Prosecutor, Shumaker wished to raise the bail so as to give the appearance of a tough prosecutor, in the elections were upcoming and he wished to use the move as a political tool for his campaign.

Clark County Assistant Prosecutor Carey appeared in Court and argued for the $185,000.00 bail, by Judge Lorig set it at $100,000.00, ruining Plaintiff's chance for release, as he could not make the double amount originally set.

On November 6, 1988, public defender Morris visited the Plaintiff in jail and advised him that a "speedy trial" deadline was set for November 8, 1988, and requested the Plaintiff sign a time waiver. Plaintiff initially refused to sign the waiver and pressed public defender Morris for a trial. Public defender Morris eventually persuaded the Plaintiff to sign the waiver convincing him to wait one more week for the DNA test results, which were assured to be shortly forthcoming.

Said time waiver was made in open court before Judge Lorig, and during the process, Defendant Prosecutor Shumaker made the statement to the Court that the DNA result were due in 4-6 more weeks.

The Plaintiff returned to jail, and finally was taken to Miami Valley Hospital for physical therapy for his hand. Plaintiff's personal physician scheduled the Plaintiff for surgery on November 28, 1988. This delay resulted in injury to the Plaintiff. Further, the failure to provide him with pain medication is not only malpractice, but cruel and unusual punishment.

Plaintiff underwent surgery at Miami Valley Hospital and was handcuffed to his bed and was under guard at the hospital during his recovery following surgery. Upon his return to the jail, he was placed in solitary confinement. His physician had prescribed Tylenol #3 for post-surgical pain. Said pain medication was denied, and Plaintiff suffered unspeakable pain and agony due to the lack of any and all prescribed analgesics. Plaintiff became severely depressed and despondent over the pain and the events surrounding his prosecution.

Approximately three weeks prior to December 23, 1988, the Plaintiff received a letter from Defendant Prosecutor Shumaker's office stating that the DNA results should be available about December 23, 1988.

Becky Garrity, the Plaintiff's girlfriend, and an employee of the Clark County Sheriff's office had contacted Defendant Springfield Police Chief Roger Evans to inquire about the delay in obtaining the DNA results. Defendant Chief Evans stated that the samples were not submitted to the diagnostic testing lab until one month after Plaintiff's arrest.

Further, Ms. Garrity frequently contacted the office of public defender Morris to press for action. During this time, Ms. Garrity befriended Morris' personal secretary, Garnet Roberts.

At the time the above noted letter was sent to the Plaintiff (approximately 12/1/88), Ms. Roberts told Ms. Garrity that the DNA results were back from the lab and were negative, but that other samples had been sent to the diagnostic testing lab from other jurisdictions that were investigating similar attacks.

A review of the Cellmark notes indicated that on or about November 25, 1988 the Prosecutor called Cellmark to tell then of the court date of January 11, 1989 but advised them that the Plaintiff would probably plead guilty.

At some point close to Christmas, during one of their frequent conversations, Ms. Roberts related that she had talked to Judge Lorig's secretary, Dee Gibson. Ms. Gibson stated that public defender Morris had been in Judge Lorig's office, and that the Judge stated to Ms. Gibson that "you know the DNA results are back and they are negative". Ms. Roberts related to Ms. Garrity that the conversation between Judge Lorig and Ms. Gibson so upset Ms. Gibson as to the fact that the Plaintiff was illegally incarcerated that Ms. Gibson was going to personally discuss this fact with Judge Lorig.

Ms. Garrity relayed this information to the Plaintiff. When the Plaintiff next saw public defender Morris, he asked if the DNA results were back from the diagnostic testing lab. Public defender Morris stated that

"nothing had come back yet", and as Plaintiff did not want to betray Ms. Roberts' confidence, he did not confront public defender Morris.

On January 4, 1989, at approximately 7:00 a.m., public defender Morris visited the Plaintiff in Jail and advised Plaintiff that the DNA results were going to be Federal Expressed that day at 3:00 p.m. At 3:15 p.m., public defender Morris returned and advised Plaintiff that he was to be released in one hour. Plaintiff was released at approximately 4:30 p.m. on an Own Recognizance bond. The charges against Plaintiff were dismissed by Defendant Prosecutor Shumaker on January 12, 1989.

A review of the Cellmark records indicate that the testing procedures are unclear as to when they took place but that a total of 109 days transpired from submission to the laboratory to the transmission of the "no match" finding. As a comparison the records reflect that it took only 19 days to match the DNA with the true criminal. This delay is inexcusable and is unexplainable.

II. ARGUMENT

The Defendants, both individually and in their official capacities are certainly liable to the Plaintiff in the case at bar as a matter of fact and law. Indeed, the previous case law provided to the Court, the affidavits submitted herewith, undisputed facts of the case at bar, and all pleadings to date establish liability as a matter of law. These Defendants, taken together, are liable under 42 U.S.C. § 1983 for the Constitutional violations which resulted in the wrongful arrest, search, incarceration, investigation, line-up,

prosecution and lack of adequate medical care. This liability is predicated upon much more then the doctrine of respondeat superior. These Defendants were joint tortfeasors who violated not only Federal law, but who also as joint tortfeasors who also committed various state law infractions for which Plaintiff is also provided redress by the law. The joint and several liability mandates that all Defendants be held accountable Minnich v. Ashland Oil Co., 15 Ohio St. 3d 396 (1984); Pang v. Minch, 53 Ohio St.3d 186 (1990). Further, any Defendant who also tortuously placed the Plaintiff in jeopardy is also liable for any other torts committed against him by subsequent defendants. See Travelers Indemnity Co. v. Trowbridge, 41 Ohio St. 2d 11 (1975).

The Defendants, by and through their counsel, have improperly mixed the issues of whether or not all the Defendants, can be sued in bother their individual capacity and their governmental capacity. The law in this matter is very clear. In the case of Brandon v. Holt, 469 U.S. 464 (1985), it is well established that a cause of action can be brought and liability can be found both against a governmental official in his individual capacity and also in his official capacity. If it is in his official capacity, the suit is in effect against the government entity for purposes of imposing liability in any judgment. This, however, does not preclude the right to bring the suit, both in the official capacity and personal capacity, for deprivation of constitutional rights of plaintiff. See Kentucky v Graham, 473 U.S. 159 (1985), which was held.

> "That personal-capacity civil rights suits seek to impose personal liability on a governmental official

> for action he takes under color of state law; in contrast, official capacity suits generally represent one another only another way of pleading an action against the entity of which the officer is an agent."

See Graham, at p. 167 for complete discussion.

In Graham, supra, it was established that a plaintiff was entitled to a judgment of personal liability against a public official in a "1983" action, if it is shown that the official, acting under color of state law, caused the depravation of a federal right. More is required in an official capacity action for the governmental entity for liability under "1983" only when the entity itself is a "moving force" behind the depravation. In the case at bare, we have both official capacity action, which is a moving force, and individual misfeasance, malfeasance, and non-feasance. Indeed, not only inaction, but reckless and grossly negligent disregard of the depravations of constitutional rights of the Plaintiff permeate the facts at bar. In the Graham case, the court found at p. 163 that there had been a complete breakdown in police discipline and it created an uncontrolled situation. It appears there was an analogous breakdown of the due process protections afforded the Plaintiff in the prosecutorial process.

The Defendants cite Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658 (1978). The Monell case simply made local government units "persons" to whom the Civil Rights Act applied, and found that municipal governments could, indeed, be liable to persons who, in fact, were deprived of Constitutional rights pursuant to 42 U.S.C. §1983. Further, the courts found that the municipality could not be held liable simply under the theory

of respondeat superior. Respondeat superior can be a basis for liability for facts committed in violation of law and for individual capacity torts. In the Monell case, the court, however, found that a local governmental could not be sued under Sec. 1983 for an injury inflicted solely by its employees or agents. Instead, it is when the execution of the government's policy or custom, whether made by its law makers or by those whose acts may fairly be said to represent official policy, inflicts the injury that the government's entity is responsible under §1983. In the Monell case, even though that case had nothing to do with a police misconduct case, but instead, involved unpaid leave of absences for social workers, the court found that the official policy was a moving force of the constitution violation found.

Furthermore, "without attempting to draw the line between actions taken pursuant to official policy and the independent actions of their employees and agents, the Monell court left the "full contours" of municipal liability under §1983 to be developed further on "another day". See: City of St. Louis v. Prapotnik 108 S.C. 915,923 (1988)

Those days have come. In City of St. Louis v. Praprotnik, supra, Monell was expounded such that one person, if State law confirms that person with final policy-making authority, may by his action, subject municipal government to §1983 liability Id. at 924.

The Court is also directed to the case of City of Canton v. Harris, 109 S. Ct. 1197 (1989). In that particular case, the court very clearly found that inadequacy of police training may serve as a basis for 1983 municipal liability

only where failure to train amounts to deliberate indifference to right of persons with whom police come into contact. Certainly, indifference is the mildest term to be used when scrutinizing the conduct of the Defendants toward Plaintiff.

In regards to the County, Sheriff, and Prosecutor, in Pembaur v. Cincinnati 475 U.S. 469 (1986), the United States Supreme Court in reviewing Ohio law stated that "based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances Id. at 484. This would be absolutely true of the Sheriff in regards to the jail, medical care, competent doctor assistance and a host of other such statutory duties.

If Defendants argue that their actions in no way represent any official policy because they only happened one time, attention is directed to Owens v. City of Independence, 445 U.S. 622 (1980). The Court held "even a single decision by such a body unquestionably constitutes an act of official government policy". Id. Here, there was one constitutional violation of the law after another. Collectively, they should shock the conscience of the Court. Wilson v. Beebe, 770 Fed 578 (6th Cir. 1985).

And finally, the Ohio Court of Appeals for Franklin County decided that a corrections officer's unjustified use of force against an inmate does not automatically take his action outside the scope of his employment, and the State may be held liable under the theory of respondeat superior. See, Thomas v. Ohio Department of Rehabilitation and Correction, 48 Ohio App.3d 86 (1988). Indeed, such single contact provided a

course of action in Molton v. City of Cleveland, 839 F. 2d 240 (6th Cir. 1980).

In this particular case, it is certainly established that there was a deliberate and discernible policy to maintain an adequately trained police department by the Defendants. The lawful requirements for investigation, search, arrest and prosecution are established by State law. The required training for a police officer emphasizes the adherence to the standards and they cannot be ignored through a failure to train or alternatively, a deliberate indifference to implement. See City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). In the case at bar, it is quite clear that it is more than speculation that the total indifference and deliberate and discernible lack of investigation, training, supervision, and maintenance of appropriate standards for governmental officers by the Defendants, City of Springfield and Clark County caused the wrongful persecution of the Plaintiff.

It has been established as a matter of law that officers who have been subjected to so little policy training and supervision that their conduct had been found to be reckless and grossly negligent and may be found ultimately to cause future misconduct was such certain that liability attaches. As the court found in Urseth v. City of Dayton, 680 F. Supp. 1150, 1151 (1987):

> "In addition, while there may be those familiar with the facts of this case that would deem it more appropriate to punish the City of Dayton for a 'supervisory policy regarding the organized crime unit of the Dayton Police Department' [that] was so reckless and grossly negligent that future misconduct

was almost inevitably or substantially certain to occur.."

In Canton v. Harris, supra, the court held that the inadequacy of police training can, indeed, serve as a basis of §1983 liability where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This also would pertain to the deliberate indifference in selection, supervision, or maintaining adequate standards.

It, undoubtedly, can be argued that where public officials allow their police officers to continue without any type of discipline, additional training, change in policies, selection, and procedures, that, indeed, the City and the individuals may be held liable. See Languriand v. Hayden, 717 F. 2d 220, 227 (5th Cir. 1983). Clearly, the Defendants in the case at bar have at least implicitly authorized, approved, and knowingly participated in the unconstitutional conduct of the offending officers by their failure to take any appropriate action. The court in Grandstaff v. City of Borger, Tex., 767 F 2d 161 (1985), found the most important findings as to whether or not the requirement of the affirmative link between the approval of the City policy makers and the moving force requirement.

It is further clear that there does not need to be more than one incident where additional evidence is available. In this particular case, there has been more than one incident proven to have occurred, but only necessary to look at Grandstaff, supra, in regards to the discussion of this requirement. One constitutional violation of Plaintiff was heedlessly reaped upon another. He not only suffered the

emotional pains of same, but also the physical ones by failure to provide medical treatment to the Plaintiff "since he would get taken care of in prison".

> "An injured plaintiff is not likely to document proof of a policy or disposition, either of the policymaker or throughout the police force, that disregards human life and safety. The disposition must be inferred circumstantially from conduct of the officers and of the policymaker. Prior incidents of abusive police conduct tend to prove a pattern or custom and the accession to that custom by the policymaker. See Bennett, 728 F. 2d at 768. But the plaintiff may encounter difficulties in making that proof, because of the lack of available credible witnesses and the avenues for dispute and distraction over the actual facts of each specific incident. No incidents prior to August 11, 1981 were proved here...The disposition of the policymaker may be inferred from his conduct after the events of that night. Following this incompetent and catastrophic performance, there were no reprimands, no discharges, and no admission of error. The officers testified at trial that no changes had been made in their policies. If that episode of such dangerous recklessness obtained so little attention and action by the City policymakers, the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. If what the officers did and failed to do on August 11, 1981 was not acceptable to the police chief, changes would have been made. . .This reaction to so gross an abuse of the use of deadly weapons say more about the existing disposition of the City's policymaker than would a dozen incidents where individual officers employed excessive force. The policymaker's disposition, his policy on the use of

> deadly force, after August 11. See 2 Wigmore, Evidence §§382, 437 (rev. 1979). As subsequent conduct may prove discriminatory motive in a prior employment decision, see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 36 L.Ed 2d 668 (1973), and subsequent acts may tend to prove the nature of a prior conspiracy, see Anderson v. United States, 417 U.S. 211, 219, 94 S.Ct. 2253, 2260, 41 L.Ed.2d 20 (12974), so the subsequent acceptance of dangerous recklessness by the policymaker tends to prove his pre-existing disposition to policy."

Indeed, the Court needs merely to review Hayes v. Jefferson County, Kentucky, 668 F. 2d 869 (6th Cir. 1982) to find that where it is shown that supervising officials or public officials either encouraged specific incidents of misconduct or in some way directly participated in or, where the municipality completely failed to train the police force or provide training so reckless or grossly negligent that future police misconduct is almost substantially certain to result, there may be a finding of liability. The alternative to the facts at bar is a finding that the Defendants willfully disobeyed the training received, and proceeded to violate the rights of the Plaintiff.

In Canton, supra, at P. 1205, the court stated the requirement for finding liability against a city or their public officials:

> "Monell's rule that a city is not liable under §1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as the police officers, represents a

policy for which the city is responsible. That much may be true. The issue in a case like this one, however, is whether that training program is adequate, and if not, the question becomes whether such inadequate training can justifiably be said to represent city policy. It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury."

See also, Werstak v. Heffernan, 789 F. 2d 968 (1st Cir. 1986), where the court clearly found at P. 975:

"That there was evidence the City of Worchester failed to properly train its officers about policy and the use of firearms, high speed chases, and road blocks. There was evidence that the City failed to instruct its officers in the amount of force that should be used in making arrests or the need to inspect injured prisoners as required by Massachusetts Injured Prisoners Statute. . .And there was evidence that the city had not adequate procedure for the filing of reports as to any of the foregoing occurrences. All of these areas were implicated in the arrests in the case. The testimony further showed that the city never conducted any sort of investigation of the circumstances of the plaintiff's arrest, there were claims of brutality. It is readily apparent to us on

what basis the jury judged the City of Worchester liable for gross negligence."

In Molton v. City of Cleveland, 839 F. 2d 240 (6th Cir. 1988), the court found that the City of Cleveland could be held liable for the wrongful death of the plaintiff's deceased when they failed to provide adequate treatment and were deliberately indifferent to his serious medical needs while he was being detained as a prisoner in jail. Certainly, the Plaintiff need not die in order to prevail under the protection of the law. The fact that the County Sheriff, his subordinates and the jail doctor willfully ignored the instructions for therapy upon their own admission forms, as well as the repeated requests of the Plaintiff, makes the conduct malicious, as well as heedlessly indifferent.

In addition, Defendants violated Plaintiff's clearly established rights by falsely imprisoning him, Dowsey v. Wilkins, 467 F.2d 1022 (5th Cir. 1972), Beilghtol v. Kunowski, 486 F.2d 293 (3rd Cir. 1973), by continuing to detain him that it was definitely established that he was not guilty of the crimes charged, , 486 F.2d 293 (3rd Cir. 1973), by continuing to detain him that it was definitely established that he was not guilty of the crimes charged, Tyler v. Witkowski, 511 F.2d 449 (7th Cir. 1975), Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968), and by continuing to detain Plaintiff where he continued to protest that he was the victim of a mistaken identity, the Defendants having refused to investigate his alibis that proved his innocence. Rodriguez v. Roth, 516 F. Supp. 410 (E.D. Pa. 1981).

The Plaintiff has alleged sufficient unrebutted facts to indicate that the Defendants violated clearly established rights of the Plaintiff as a matter of law. Further, the Defendants have failed to provide any evidence that no material issue of fact remains. They simply claim good faith and that these things do happen. Such defense is not permissible when the courts construes the facts in a light most favorable to the Plaintiff pursuant to 12(B)(6) motion or in construing it most favorably for the Defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure.

As for the claim of Plaintiff against the Clark County Prosecutor, the Court should find against the Prosecutor as a matter of law upon the facts alleged.

Courts have found that a prosecutor's public statements and efforts to obtain publicity should not be absolutely immune from civil liability. Butz v. Economou, 98 S.Ct. 2894, 2898 (1978); Hamptom v. Hanrahan, 600 F.2d 600, 632 (7th Cir. 1979); Briggs v. Goodwin, 569 F.2d 10, 26 (D.C. Cir. 1977); Marrero v. City of Hialeah, 625 F.2d 499, 505-06 (5th Cir., 1980); and Alker v. Cahalan, 524 F.2d 681, 684-85 (6th Cir., 1976).

The qualified immunity defense was created so that prosecutors, whose offices require them to undertake discretionary action, may not be held liable unless the plaintiff can show that there was a clear existing precedent establishing a constitutional or federally enforced right at the time that the violation occurred. Malley v. Briggs, 475 U.S. 335, 341 (1986); Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

The defense of qualified immunity is only available to the prosecutor in his individual capacity not in his official capacity. Certainly, other courts have determined that the prosecutor is subject to redress for on-going constitutional violations. See Webster v. Sowders, 846 F.2d 1032 (6th Cir. 1988); Parisco v. U.S. Dept. of Justice, 851 F.2d 93 (3rd Cir. 1988); Shafer v. Wilcock, 676 F.Supp. 1092 (D. Utah 1987). Moreover, if the plaintiff has asserted claims for declaratory and injunctive relief, the doctrine of qualified immunity cannot shield a government official from this type of relief. Weber v. Sowders, 846 F.2d 1032 (6th. Cir. 1988); Prisco v. United States Department of Justice, 851 F.2d 93 (3rd Cir. 1988); cert. den., 109 S. Ct. 2428; Shafer v. Wilcock, supra.

The question of improper motivation of the defendant in prosecutorial misconduct cases, can be used to defeat a defense of good faith on qualified immunity. The Sixth Circuit stated that when unlawful motive or intent is an element of the substantive claim, the "official's motive or intent in carrying out challenged conduct must be considered in the qualified immunity analysis." Poe v. Haydon, 853 F.2d 418, 431 (6th Cir., 1988). Here the motive for re-election and publicity is certainly not a proper one. The belief that prosecutors are pursued with no duty to disclose or investigate evidence favorable to the accused is grossly erroneous, DR7-103.

As stated by one of the most respected trial court judges in the country ". . .qualified immunities . .can be rebutted by showing that the defendant lacked good faith." C. Ritchey, Manual on Employment Discrimination Law and Civil Rights Actions on the Federal Courts (Federal Judicial

Center, January, 1988 Ed.), p. D2-9 citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Clark v. Beville, 730 F.2d 739 (11th Cir., 1984). Other circuits have also looked at the motivation behind challenged conduct when making qualified immunity determinations: Wood v. Sunn, 852 F.2d 1205 (9th. Cir., 1988) (a finding of deliberate indifference to medical needs was held inconsistent with an assertion of qualified immunity); Waldrop v. Evans, 871 F.2d 1030 (11th Cir., 1989) (granting of qualified immunity via summary judgment precluded by factual issues of deliberate indifference); Pueblo Neighborhood Health Centers v. Lovavio, 847 F.2d 642 (10th Cir., 1988); Feeman v. Blair, 862 F.2d 1130 (8th Cir., 1988) (officials, though entitled to qualified immunity on claim of illegal search, not grated immunity on claim alleging retaliation because motive was at issue.); Fanning v. Montgomery County & Youth Services, 702 F.Supp. 1184 (E.D. Pa. 1988) (no qualified immunity on claim involving malicious intent). The courts have expressed a willingness to remedy prosecutorial misconduct in certain types of cases. The need for such action was explained in Marrero v. City of Hialeah, 625 F.2d 49, 505-06 (5th Cir., 1980):

> "When a prosecutor steps outside the confines of the judicial setting, the checks and safeguards inherent in the judicial process do not accompany him, and thus there is greater need for private actions to curb prosecutorial abuse and to compensate for abuse that does occur. No surveillance comparable to that of a judge serves to check a prosecutor's zeal when he makes statements about individuals outside the courtroom or when he engages in investigative activities of directing, advising, assisting, or

> participating with, the police in obtaining evidence. Moreover, when a prosecutor engages in unconstitutional conduct outside the courtroom, absent are the remedies which the judicial process by its nature provides for illegal conduct occurring within the process. When a prosecutor makes false allegations against a defendant in the course of a trial, the opposing counsel is available to counteract immediately the damaging statements and an impartial panel of jurors is present to sift through the allegations and evidence to determine where the truth lies. Similarly, when a prosecutor engages in illegal conduct in the course of a trial, the judge, the jury and the opposing counsel, the witnesses, and the appellate process all serve in different ways to mitigate the impact of the conduct."

The Eleventh Circuit in Powers v. Coe, 728 F.2d, supra, at 105 found that published charges made by a prosecutor of a stigmatizing nature involving a protected property interest is a cognizable under the Due Process Clause where the allegation is false. In Powers, supra, the plaintiff alleged that the prosecutor systematically leaked information from the grand jury to the media. The Court permitted that part of the claim provided that the plaintiff demonstrated that he would have been deprived or in fact was deprived of a fair trial.

Under DR-107 TRIAL PUBLICITY of the Code of Professional Responsibility the Prosecutor can be held accountable. a violation of the Code of Professional Responsibility standing alone may not give rise to a federal claim since it does not have the force of law. As Judge Brieant explained in Martin v. Merola, 389 F. Supp. 323, 326 (S.D.N.Y., 1975) "if so this breach of prosecutorial

responsibility does not amount to a 'deprivation of...rights, privileges or immunities secured by the Constitution and laws.' 42 U.S.C. §1983". However, since the Code sets forth a specific standard to be followed by prosecutors it may be possible for such a violation to give rise to state tort actions for intentional infliction of emotional distress, defamation or invasion of privacy. Walker v. Cahalan, 542 F.2d 681, 684-85 (6th Cir., 1976). In the case at bar the additional conduct of the Prosecutor in failing to pursue a timely manner the DNA test procedures, the delay of the trial in November where the Prosecutor expected a plea of guilty (See records from Cellmark), the deliberate indifference to the Plaintiff's alibis and medical condition presents much worse. The political overtones simply exacerbate the misconduct.

The lack of medical care by the County, the County Sheriff in his official and individual capacity, and the jail Doctor, in his individual and official capacity, potentially not only gives rise to claims under State law because of the requirements to provide medical care to the Plaintiff while incarcerated, but also under Federal law where the medical treatment, which said Defendants were aware of being prescribed, is totally and heedlessly ignored. See Wood V. Sunn, Molton v. Cleveland, supra, and Green v. Carlson, 581 F. 2d 669(7th Cir., 1978). There is no question but that Plaintiff has a right to a determination of liability as a matter of law against the Defendants for said misconduct but also against their conduct in wrongfully instituting the process that allowed the harm to occur. See Travelers Indemnity Co. v. Trowbridge, 41 Ohio St. 2d 11 (1975).

The requested discovery would in no way overly burdensome on the Defendants, in the since contemplated in Harlow v. Fitzgerald, 457 U.S. 800 (1982), wherein the court's concern settled with the unwanted possibility that the government official might find himself exposed to liability he could not have reasonably contemplated at the time of the alleged illegal activities. Id. at 3; Mitchell v. Forsyth, 472 U.S. 511 (1985). The conduct of the Defendants in this case should have made them well aware that they could ultimately be held liable for their actions.

Defendants have, in their memorandums, oversimplified the careful analysis utilized by the Harlow Court by simply stating that any burdensome discovery should not be permitted.

From the outset it should be understood that the discovery issue was merely a highlight to the Court's seminal holding that the affirmative defense of qualified immunity (also referred to as "good faith" immunity) should no longer be analyzed from a subjective aspect, but merely an objective one, to wit: "that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have know". Harlow, supra at 818.

It should be further noted that Harlow was a case analyzing immunity as it applies to upper level cabinet officials or other officials who should be afforded relief from "the burdens of broad reaching discovery on actions brought

against the official" based upon the mere allegation of malice on defendants' part. See 457 U.S. 817, 818. In holding that the immunity issue be settled prior to allowing discovery, the court wanted to protect those officials who play an integral part in the running of our government and/or the smooth operation of our judicial system by eliminating the possibility of any insubstantial claims based upon those official discretionary functions. Plaintiff submits that Harlow was never intended to ban all discovery, just that discovery which ultimately might have an effect on how that official exercises his official duties. Having a police officer, prosecutor, or sheriff comply with discovery demands in this case under the facts alleged in the verified complaint and affidavits will in no way have a chilling effect on the judicial process as their wrongful actions are not so intimately related to the judicial process. Indeed, it was that process that ultimately freed the Plaintiff.

Harlow reasoned that to litigate the subjective element would permit too many insubstantial claims going to trial based upon what the defendants actually knew or what their intent actually was. So long as defendants' intent was a question of fact, courts have found that a jury's resolution is needed. Furthermore, "[i]ndividual inquiry into subjective motivation therefore may entail broad-ranging discovery....Inquires of this kind (into subjective motivation) can be peculiarly disruptive to effective government". (Again, Harlow was dealing with high level federal government officials and discovery was suspended until immunity questions could be decided so as to not disrupt the function of government.)

Since Harlow, courts have decided that police officers are entitled to a good faith or qualified immunity. Plaintiff nonetheless contends that the purpose of limited discovery as discussed therein is not applicable to a discovery request upon a lower level government official (i.e.) Police Officer.

Another reason discovery is not permitted until after the issue of qualified immunity is determined is that government officials might be held liable in retrospect for alleged actions that may have violated legal norms that were not clearly established at the time, Mitchell v. Forsyth, 472 U.S. 526 citing Harlow. The policy, procedures, and legal authority by which the Defendants conduct is to be measured is well established in the case at bar. It is not norms that are simply developing. The duties of the Defendants in investigation, prosecution, and medical care are statutorily defined.

It was this concern that caused the Supreme Court to hold that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow, supra at 818.

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly establish law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but

> whether that law was clearly established at the time an action occurred. If an official could not reasonably be expected to anticipate subsequent legal developments, nor could fairly be said to "know" that law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know th law governing his conduct. Id.

For the Defendants to plead simple ignorance or good faith to the violations of the Plaintiff's rights in the case at bar by their acts of commission is untenable in light of their clearly prescribed duties and well known rights of an accused or inmate. Ostriches are not permitted in governmental positions.

The Court in Mitchell v. Forsyth, supra, conceded that the (Defendant) may on occasion have to pause to consider whether a proposed course of action have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. 472 at U.S. 524. Furthermore, as Harlow concluded, "(w)here an official could be expected to know that certain conduct would violate statutory or constitutional rights he should be made to hesitate; and a person who suffers injury caused by such conduct may pursue cause of action. 457 U.S. at 819. In Malley v. Briggs, 475 U.S. 335 (1986), the Court held that where police officers fail to be objectively reasonable in their conduct they can be held liable. The evidence patently discloses that investigative, warrant, procurement and line-up identification methods

were totally lacking. See United States v. Leon, 104 S.Ct. 3405 (1984); Manson v. Braitwaite, 432 U.S. 98 (1977); State v. Moody, 55 Ohio St. 2d 64 (1978) and Neil v. Biggers, 409 U.S. 188 (1972).

In regards to the warrant, the Defendants' Second Supplemental Memorandum cites United States v. Leon, 104 S. Ct. 3405 (1984), as a controlling authority for the determination of the existence of probable cause in a warrant application. Leon was merely giving illustration as to when deference should not be given to a magistrate's authorization of an otherwise invalid search warrant. The invalidity of this warrant should have been known to the affiant.

One such instance to attach the issuing of a search warrant would be if the officer's affidavit was "so lacking in evidence of probable cause as to render official belief in its existence totally unreasonable". Brown v. Illinois, 422 U.S. 590 (1975).

The Court has held that a magistrate who was determined not to be neutral and detached was acting more as adjunct law enforcement officer than a judicial officer, cannot provide valid authorization for an otherwise unconstitutional search. Leon, supra. In the case at bar the entire State Court System and the executive officers involved inexplicably refused to review proffered evidence of innocence and acted solely to prosecute Plaintiff. In so doing an innocent man was stripped of all the safeguards the system of government is obligated to provide him pursuant to the Constitution and laws promulgated thereunder, malice

is inherently present in such reckless conduct. Good faith has no home in such a community of thought.

At bar we are confronted with fact that even when applying the Gates "totality of circumstance" test the warrant is so lacking any indicia of probable cause basis for issuance, that there is further eliminated the argument that said faulty affidavits and subsequent search warrants could be considered to have been rehabilitated by the magistrate's authorization.

More importantly, Leon reiterated language from Illinois v. gates, 462 U.S. 213, 238-239 (1983) when discussing the scrutiny a challenged warrant would undergo on appeal:

> "reviewing Courts will not defer to a warrant based on an affidavit that does not provide for determining the existence of probable cause...sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be mere ratification of the bare conclusions of others."

Leon, supra at 3416, citing, Illinois v. Gates.

The facts at bar provide less than the facts presented to the Gates court as to the reliability of the information upon which the officer's affidavit was based. Indeed, there was no reliability. Even the most basic investigation by the affiant, as opposed to his bare hearsay allegations, would have disclosed the falsity of the averments. There must be some redress at law for such governmental misconduct.

The qualified immunity defense will fail not only for the Defendants named herein, but for all Defendants because the alleged conduct, as proven, would have violated laws rules, regulations, procedures and norms which at the time of the alleged actions were clearly established and known by the Defendants at that time. These are constitutional mandates and protections that have been understood and utilized for year. There are state and federal laws dealing with search warrants, arrest, alibis, duties to investigate, health care in jail, etc. The law cannot be totally abrogate by a simple care claim of "good faith". A claim of "no faith" is more intolerable but the law requires strict compliance by the governmental officers for them to be in good faith.

Defendants should not be permitted to ask this Court to grant them immunity from constitutional violations imposed upon the Plaintiff due to their lack of knowledge as to the state of the law at the time of their actions. They well knew that they violated the constitutional rights of the Plaintiff by failing to pursue their governmental duties within any well-defined range of the standards established. If they didn't know they certainly acted recklessly and heedlessly in ignoring their duties. Indeed, the attempt to claim lack of knowledge is akin to admitting liability for a total lack of training. See Harris v. Canton, supra.

Indeed, there are State causes of action applicable to the case at bar that require records and documents be produced. To date, this very basic right has been denied the Plaintiff. See. State ex rel Ware v. Cleveland, 55 Ohio App. 3d (1989), Section 149.43 O.R.C. There is no basis to deny discovery in the case bar unless the

Court enters judgment for the Plaintiff upon the summary judgment motion, supra, upon the issue of liability. Then only damages remain to be determined.

For all the foregoing reasons, the support factually provides in the verified Complaint, Affidavits, and Exhibits filed by the Plaintiff is entitled to judgment as a matter of law as no real serious dispute of facts exist and the facts not only overcome any claim of qualified or good faith immunity, but, instead impose liability upon the defendants for the wrongful conduct to the Plaintiff. Rule 56 Federal Rules of Civil Procedure.

In the alternative, the Plaintiff moves this Honorable Court for an Order overruling the Defendant's Motion to Dismiss or for Judgment upon the Pleadings and to Order discovery to proceed upon those issues determined by the Court to be in dispute. Certainly, the Plaintiff is entitled to, at the very least, a trial against the Defendants who have damaged him by their blatantly wrongful conduct.

Respectfully submitted,

BRANNON, GIANGUGLOU,
DANKOF & CARAS
/s/_____
Dwight D. Brannon
Attorney for Plaintiff
/s/_____
Jose M. Lopez
Attorney for the Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STEPHEN MICHAEL RIDDER 2825 Nausset St.	*	CASE NO. C-3-90-003 (Judge Herman Weber) (Magistrate Michael Merz)
Springfield, Ohio 45503	*	
Plaintiff	*	
vs.	*	SECOND AMENDED COMPLAINT WITH
CITY OF SPRINGFIELD,OHIO 130 N. Fountain Ave. Springfield, Ohio 45502	*	JURY DEMAND ENDORSED HEREON
and	*	(Filed May 11, 1992)
CLARK COUNTY, OHIO By and Through the Clark County Board of Commissioners 120 N. Fountain Ave. Springfield, Ohio 45502	*	
and	*	
STEPHEN A. SCHUMAKER Personally And In His Capacity As The Prosecuting Attorney Of Clark County, Ohio; And For His Conduct Outside of His Office As Clark County, Prosecutor While Still Representing Himself Under The Color of Law 120 N. Fountain Ave.	*	

Springfield, Ohio 45502 *

and *

GENE A. KELLY, Individually *
And In His Capacity As
the Sheriff of Clark County *
Ohio
120 N. Fountain Ave. *
Springfield, Ohio 45502
*
and

ROGER EVANS, Individually *
And In His Capacity
As Chief of Police of *
Springfield, Ohio
130 N. Fountain Ave. *
Springfield, Ohio 45502
*
and
*
SGT. ROBERT MARCUM
Individually and In His *
Capacity As A Sergeant of
The Springfield Police *
Department
130 N. Fountain Ave. *
Springfield, Ohio 45502
*
and

DET. RONALD MENDAH
Individually and In His *
Capacity As A Detective of
The Springfield Police *
Department
130 N. Fountain Ave. *

Springfield, Ohio 45502 *

and

DET. ROBERT KERR
Individually and In His *
Capacity As A Detective of
The Springfield Police *
Department
130 N. Fountain Ave. *
Springfield, Ohio 45502 *

and

DR. WALTER LAWRENCE *
5212 Taywell Dr.
Springfield, Ohio 45503 *

Defendants

---

1. This action arises under Title 42 of the United States Code, Section 1983 and all other related sections thereto, including, but not limited to Sections 1985 through 1988, et seq. for violation of Plaintiff's rights under the Fourth Amendment, Fifth Amendment, Eighth Amendment and Fourteenth Amendment to the Constitution of the United States and pendent State Claims.

2. This Court has jurisdiction of this case under Title 28 of the United States Code, Section 1343, the constitutional questions presented, and all other basis of jurisdiction, including pendent jurisdiction of the Court.

3. At all times material hereto, the Plaintiff, STEPHEN MICHAEL RIDDER, has domiciled in Clark County, Ohio, in the Southern District of Ohio, Western Division, and is a citizen of the United States.

4. The claim for which Plaintiff herein brings this action arises from the intentional, reckless, wanton, and/or deliberately indifferent acts and omissions of the Defendants which occurred in Springfield, Clark County, Ohio, as well as the proximate areas, in the Southern District of Ohio, Western Division. The Defendants are alleged to have known , or should have known that they were violating the civil rights of the Plaintiff.

5. The CITY OF SPRINGFIELD, Clark County, Ohio, is a municipal corporation and government subdivision of the State of Ohio of which the SPRINGFIELD CITY POLICE DEPARTMENT is part thereof.

6. The COUNTY OF CLARK, STATE OF OHIO, by and through the Clark County Board of Commissioners is a governmental subdivision of the State of Ohio of which the Clark County Sheriff's Department is a part thereof.

7. The Defendant, STEPHEN A. SCHUMAKER, at all times material hereto was employed by Clark County, State of Ohio as the Prosecuting Attorney. This action is being taken for his wanton, willful, reckless, and/or negligent conduct both in his capacity as the Prosecuting Attorney wherein he enjoys qualified immunity, and outside the conduct of his office as Prosecutor for

conduct that was taken negligently, recklessly, wantonly, or willfully outside the scope of his employment and for advising and participating in the investigation of Plaintiff in violation of his aforementioned constitutional rights and further by assisting in the preparation, drafting and thereafter approving a false affidavit used to procure a warrant against Plaintiff which, had the true material facts known at the time been presented to the magistrate/judge, then said warrant would not have been issued; and further by administering his office so as to continue Plaintiff's incarceration by delaying disclosure of exonerating evidence so as to continue Plaintiff's incarceration in further violation of his aforementioned constitutional rights.

8. The Defendant, DR. WALTER LAWRENCE, is medical doctor licensed to practice medicine in the State of Ohio and, as such, was in charge of delivering medical care and treatment in the Clark County Jail at all times relevant to the case at bar, and in particular, responsible to deliver the appropriate care and treatment to the Plaintiff in the case at bar. Dr. Lawrence is sued in his capacity as an employee of Clark County, Ohio, and individually for his conduct as hereinafter alleged.

9. The Defendant, SHERIFF GENE A. KELLY, was at all times pertinent hereto in charge of the Clark County Jail, in charge of the prisoners incarcerated therein, including the Plaintiff, from September 8, 1988 to January 4, 1989, responsible for their care, treatment, control, as well as providing all appropriate medical services. It was directly by the Defendant, Gene A. Kelly, that the Plaintiff was falsely incarcerated, imprisoned, denied appropriate medical care and treatment, and prosecuted as

hereinafter set forth. Sheriff Kelly is sued as an individual *and in his capacity as the County Sheriff.*

10. The Defendant, ROGER EVANS, was the Chief of Police of Springfield, Ohio and directly in charge of the issuance of warrants, conducting any line-ups, and the pre-arrest investigation, investigation, prosecution, and incarceration of the Plaintiff from some time before September 8, 1988 until January 10, 1989 when an Entry of Dismissal was journalized in the Clark County Court of Common Pleas. Roger Evans is sued individually and in his capacity as Chief of Police.

11. The Defendants, SGT. ROBERT MARCUM, DET. RONALD MENDAH, AND DET. ROBERT KERR were, at all times acting as police agents and were acting both in the scope of their employment as police officers for the City of Springfield and outside the scope of their employment when they, individually and in concert, represented as truth, material and information which they knew was false and misleading and/or concealed and otherwise failed to disclose critical and/or exculpatory facts known to them, intentionally and/or with reckless disregard and/or deliberate indifference of the forementioned constitutional rights and other statutory rights of Plaintiff and otherwise in violation of duties imposed upon them under the law of Ohio and/or through written policies to which they are subject, for the purpose of preventing, ceasing, or ameliorating the unlawful conduct toward the Plaintiff as hereinafter alleged. These people are sued both in their capacity as police officers and individually.

12. The conduct of the Defendants complained of hereinafter was done under the color of State law and by reason of governmental authority pursuant to statute, ordinance, custom and usage. However, some of the conduct was outside of their authority pursuant to State law, state and governmental authority and, as such, they are individually liable, as well as liable in their capacity as public officers. Some of the aforesaid statutes and written policies and case law are as follows:

A) Failure to observe the Springfield City written policy, departmental rules, regulations, policies, and proper customs, as well as the statutory and case law for:

1) investigation of criminal conduct;

2) obtaining and alleging sufficient information to establish probable cause for a search warrant, including independent objective investigation to determine the truth of any informant's information on conclusionary statements of truth by others to prepare affidavits in support of warrants which set forth true facts without material misstatement or omissions;

3) reviewing defendants statements and alibis for truthfulness as part of the investigatory procedures;

4) conducting photographic spreads and identifications through photographs;

5) line-ups and in-person identification of potential defendants by victims of crimes;

6) failure to follow investigatory procedures and to follow-up investigations after arrest, including reviewing statements favorable to defendants, and alibi information;

7) failure to process and/or release critical forensic information and tests (including DNA matters) within a reasonable time;

8) for completely ignoring or showing a willful indifference to evidence of innocence.

B) Violation of R.C. 2933.22, et seq. R.C. 2935.01, et seq. and Ohio Rules of Criminal Procedure, Rules 4 and 41.

C) Violation of R.C. 5120.10, et seq., R.C. 341.01 et seq., and the Ohio Administrative Code, Sections 5120:1-7-01, et seq. (and, in particular, Section 5120:1-8-09).

D) Violation of written policies and procedures of the Clark County Sheriff and the employees of Clark County jail for willfully and/or indifferently failing to provide medical care to the Plaintiff over his entire incarceration even though they knew of his medical needs.

E) Violation by Dr. Lawrence, both independently as a physician and as an employee of Clark County, of the accepted and recognized standard of care for medical treatment of the Plaintiff.

F) For the willful indifference and on-going violation of policies, procedures, regulations, State law (statutorily and by Administrative Code) of medical health standards toward the Plaintiff which were known, or should have been known, to Clark County, the Clark County, the Clark County Sheriff, and employees of the Clark county Sheriff's Department.

G.) For the Defendant's willful indifference to medical treatment and follow-up care a indicated by the Plaintiff's treating physician, Dr. Barre.

H) For the Defendant Prosecutor's willful indifference to all the evidence presented to him to prove the Plaintiff innocent and his failure to timely dismiss charges thereupon, as well as the misuse of Plaintiff's circumstances for political advantage contrary to 7-103 of the Code of Professional Responsibility as promulgated by the Ohio Supreme Court and as a minimum standard of care, custom and care owed to an accused.

13. At all time in the case at bar, the Defendants were domiciled in Clark County, Ohio.

14. All causes of action arising under State law, either statutorily or by common law, are grounds set forth for relief hereinafter pursuant to the pendent jurisdiction of this Court.

15. At all times relevant to the matters alleged hereinafter, the Plaintiff was a citizen of the United States of America, without disability relating to his citizenship, and thereby entitled to all the privileges and immunities thereto.

FIRST CAUSE OF ACTION

16. Plaintiff incorporates paragraphs one (1) through fifteen (15) as if fully rewritten herein.

17. At all time material hereto, STEPHEN MICHAEL RIDDER, was a resident of Clark County, Ohio and was entitled to exercise his rights as a citizen of the State of Ohio and United States without fear of unlawful detention, incarceration, malicious prosecution, wrongful arrest, denial of his constitutional rights, subjection to cruel and unusual punishment, and denial of appropriate medical care and treatment.

18. The acts of the Defendants set forth hereinabove were under the color of law and pretense of statutes, ordinances, regulations, customs and usages of the State of Ohio, as alleged heretofore, and under the authority of the offices that they held.

19. The aforesaid conduct was either done intentionally, recklessly, and/or with total indifference a to the constitutional rights of the Plaintiff, and/or the Defendants acted in such a manner that was contrary to any reasonable person in their position because they knew, or should have known, that they were violating Plaintiff's constitutional rights.

20. On or about September 7, 1988 the Defendants wrongfully, unlawfully, untruthfully, without probable cause and with actual malice, caused a search warrant to be issued alleging that the Plaintiff was a rapist

and guilty of certain criminal conduct. A copy of the aforesaid search warrant is attached hereto and incorporated herein as if fully rewritten as Exhibit "1".

21. The search/arrest warrant was issued to and based solely upon an affidavit attached a Exhibit "1-A". This affidavit was drafted and designed to manufacture probable cause by containing information which Defendants knew, or should have known, was false and/or misleading while also omitting other critical and/or exculpatory known facts with foreknowledge that had these true facts been presented and/or the hidden facts revealed, there would not have been probable cause to issue the above search warrant so that no warrant would have been issued or, alternatively, a less intrusive warrant would have revealed Plaintiff's innocence without significant violation of Plaintiff's constitutional, statutory and/or common law rights. The false, misleading and/or omitted statements include but are not limited to the following facts which were known individually and collectively to the affiant, investigators, and other who assisted in drafting the affidavit and procured said warrant:

A) While representing that a series of rapes and attacks with a distinct pattern likely committed by the same individual (so that elimination of a suspect from one or more would likely eliminated him as a suspect in the others) failed to reveal that their investigation disclosed that during several of these rapes, Plaintiff was likely and, in fact, was in another state and during one, was in a Florida jail for a minor infraction.

B) Failed to reveal that the victims were either blind folded, attacked in the dark, approached from the rear, or attacked under other circumstances which prevented them from clearly seeing their attacker's face or otherwise impairing their ability to render a reliable positive identification.

C) With regards to the attack on Katherine Davis on January 5, 1986 (Affidavit, page 1, paragraph 3):

1) presented part of her description of her attacker but omitted that she reported him to be 5'2" with dark hair. Plaintiff is 5'11" with blond hair.

2) failed to disclose that the police background check (referred to in affidavit at page 3, paragraph 2) revealed that a person identified as Plaintiff was in a Florida jail on the night of that attack.

3) referred to a green International Scout seen near the attack but failed to mention Plaintiff neither owned not had access to such a vehicle.

D) With regards to the June 8, 1986 attack on Kim Carr (affidavit, page 1, paragraph 4):

1) failed to mention that the victim stated that she could not visually identify her attacker.

2) failed to disclose that the police background check (referred to on page 3, paragraph 2 of the affidavit) revealed Plaintiff was working in Michigan when this attack occurred.

3) after the rape she saw the Plaintiff in the hospital but could not identify him.

E) As to the July 19, 1986 attack on Ms. Carr (affidavit, page 1, paragraph 5):

1) that after this attack, Ms. Carr had visual contact with the plaintiff for some time but could not identify him as her attacker.

2) that Plaintiff was still working in Michigan at the time of this attack and was not otherwise reported in the area.

3) that the attacker was initially reported to have brown hair and a mustache but omitted that Plaintiff has light blond hair and is clean shaven.

4) could not reliably be expected to identify her attacker, visually or otherwise.

F) With regards to the June 23, 1987 attack on Judy Sutton (affidavit omitted):

1) she could not visually or otherwise reliable identify her attacker

2) seriously scratched the face of her attacker and Plaintiff was not reported to have such scratches at or around the time of this attack.

3) with regards to the means of attack and use of duct tape, see paragraph "O" below.

G) With regards to the attack on July 14, 1987 (Terry Tinkler) and August 2, 1987 (Jill Ault) (Affidavit, page 2, paragraph 1):

1) omitted that they reported a description of the attacker which differed from Plaintiff in material aspects including reporting a receding hairline whereas Plaintiff has a full head of hair

2) omitted that these victims did not view the attacker for a sufficient time or under circumstances from which a reliable identification could be expected.

3) as to the method of attack and the use of duct tape, see paragraph "O" below.

H) As to the September 3, 1987 attack on Mary Phillips (Affidavit, page 2, paragraph 3):

1) omitted that she knew Plaintiff and saw him after (and before) the rape but did not accuse or identify him as the attacker (visually or by voice) or even insinuate that he might have been the attacker.

2) she could not physically describe the attacker on the night of the rape.

I) As to the June 27, 1987 attack on a Sidney Woman (Affidavit, page 2, paragraph 5), later identified as Celena Lovett:

1) omitted that on the night of the rape she could not provide a physical description of her attacker and did not see him.

2) as to the duct tape see paragraph "O" below.

J) As to the October 18, 1987 attack on another Sidney woman (Affidavit, page 2, paragraph 6):

1) omitted that the victim insisted that she could not identify her attacker under any circumstances and told affiant and other investigators this prior to the affidavit.

2) that she was otherwise unable to provide a reliable positive identification of the attacker.

3) that the police investigation revealed reports that Plaintiff, when the attack occurred, was in the company of others including Plaintiff's live-in girlfriend (who is employed with the Clark County jail).

L) As to individual noted on page 2, paragraph 8 of the affidavit, who purportedly told the police that Plaintiff was camping near Wapakoneta on the night of the July 5th

rape and who police failed to identify and/or reveal his reliability:

1) that the information was unreliably obtained.

2) that Plaintiff was camping with his girlfriend.

M) As to the informant purported on page 3, paragraph 1 of the affidavit, whom affiant failed to identify or reveal reliability:

1) misrepresented numerous facts including, but not limited to, the fact that Plaintiff had several girlfriends during the time of the rapes, including a steady girlfriend since July 4, 1988, with whom he was living, that after a four year absence Plaintiff returned to the Springfield area in April, 1987, a year and four (4) months after the attacks started.

2) omitted that the information was not reliably obtained.

3) misrepresented Plaintiff's presence in the area.

5) that Plaintiff, during th course of his employment, did not service any property near a victim at or around the time of the attack.

6) failed to reveal that several material characteristics attributed to the attacker did not reflect Plaintiff's appearance including, but not limited to hair color and receding hair line.

7) Plaintiff was not fired from his lawn service job.

N) As to the Florida background check reported on page 3, paragraph 2 of the affidavit, affiant failed to reveal that the check also disclosed that Plaintiff continued to live in Florida through May, 1986 and was in jail there for a minor offense during one of the serial rapes and that from Florida, Plaintiff moved to Michigan until he returned to Springfield in April, 1987.]

O) As to page 3, paragraph 4, of the affidavit, affiant falsified what was told to him and investigators by a "company official":

1) the company official did not state Plaintiff did not carry duct tape and noted that duct tape was not used to repair hose leaks on the job as company hoses were under great pressure

2) company official did not state that Plaintiff had accounts in he Sidney area in the Summer/Fall of 1987 but, rather, provided records which clearly showed that Plaintiff was in the

Sidney area only on a single Saturday morning, that he returned promptly in the afternoon and that this was not on the day of any rape

3) affidavit omitted that Plaintiff's job records provided by the company official revealed that any proximity to the location of any rape was not near the time or the occurrence

4) omitted that Plaintiff's date of hire (4/3/87) was his first day returning to the area after a four (4) year absence.

P) As to claims asserted on page 3, paragraph 5 of the affidavit, failed to reveal that due to the circumstances of the rapes noted herein especially that due to darkness, lack of visual contact or, at best, a brief fleeting glance and street of their attack and other circumstances of the attack, that non of these victims could be expected to provide a reliable positive identification.

1) omitted revealing that the victim Kim Carr had seen Plaintiff after the rape while Plaintiff was at the hospital where she worked and that she could not visually identify Plaintiff as her attacker

2) that at the time Plaintiff was in said hospital, his hand was severed, he was suffering extreme pain, was under medication, and was

in stress and shock and under the circumstances when Ms. Carr heard his voice for a brief period and thought it sounded "something like" the person who attacked her almost two years prior but could not identify Plaintiff as her attacker.

3) that Ms. Carr's identification through "process of elimination" was based upon said hospital an arrest photo of Plaintiff and was otherwise tainted

4) failed to reveal that no physical (e.g., body samples) evidence was recovered from the attack on Ms Carr which could otherwise identify anyone as the attacker.

5) omitted that the other two victims whose indication of a resemblance suffered from a suggestive photo spread and could not be expected to provide reliable identification due to the circumstances of the attack.

6) that Katherine Davis originally identified her attacker as 5'2" with dark hair (Plaintiff is 5"11" with blond hair)

7) that the rape of Katherine Davis occurred while Plaintiff was in a Florida jail

8) other omissions and misstatements set forth in items B,C,D,E, and G above.

22. Defendants Marcum, Mendah and Kerr, individually or collectively, participated in the preparation, drafting, swearing to, and presentation of the affidavit with foreknowledge of its falsity and omissions set forth above.

23. Defendant Schumaker advised, supervised and/or participated in the investigation and drafting an approved the affidavit with foreknowledge of its falsity and material omissions.

24. Defendant Evans supervised, advised and/or participated in the investigation and drafting and approved the affidavit with knowledge of its falsity and material omissions.

25. Individually, collectively, and in concert, each of the Defendants Marcum, Mendah, Kerr, Schumaker and Evans knew of, or should have known, that had the true facts known to them been represented in said affidavit, that a warrant could not have been obtained as probable cause would have been lacking but, none the less, intentionally or with reckless disregard of Plaintiff's forementioned constitutional rights, violated said rights under color of law by falsely obtaining a warrant.

26. The aforementioned actions, in violation of Plaintiff's constitutional rights, by Defendants Marcum, Mendah, Kerr, Schumaker and Evans were pursuant to practice, custom, and unwritten policy of Defendants Clark County, Ohio and the City of Springfield, Ohio whereby when probable cause was lacking for some persons considered significant suspects, affidavits were prepared with known omission of facts and material misstatements

and misrepresentations so as to procure warrants and affect arrests in the hope of obtaining, extraconstitutionally, incriminating evidence.

27. The search warrant was issued in violation of the Plaintiff's constitutional rights under the Fourth, Fifth, and Fourteenth Amendments, as well as contrary to the statutory law, policies, customs, and procedures as aforesaid.

28. The search warrant was defective, not only in that it lacked probable cause, but that the Defendant affiant, failed to investigate any of the allegations thereunder from sources readily available to him. Their willful and deliberate omissions were approved by the other employees of the Springfield Police Department, as was the custom of the Defendant. The errors were known to, or should have been known by, the City of Springfield and other Defendant employees of the City, as named herein.

SECOND CAUSE OF ACTION

29. Plaintiff incorporates paragraphs one (1) through twenty-eight (28) as if fully rewritten herein.

30. With knowledge and/or reckless disregard for the truth, Defendants Schumaker, Kelly, Evans, Marcum, Mendah and Kerr, individually, collectively and in concert and in furtherance of the custom and unwritten policy of Defendant City of Springfield and Defendant Clark County, as set forth in paragraph twenty-six (26) (incorporated herein if fully rewritten) so as to receive the endorsement, approval and support of these Defendants, again presented the

material misstatements while concealing the omission as set forth in paragraph twenty-one (21) (incorporated herein as if fully rewritten). However, on this occasion the purpose was to secure Plaintiff's arrest and indictment and thereafter to continue his incarceration by intentionally and/or with reckless disregard, violating the Plaintiff's aforementioned constitutional rights.

31. Other information available and known by the Defendants but, deliberately ignored included, but it not limited to, the following:

A) That on or about January 5, 1986, the date of the first alleged crime, the Plaintiff was incarcerated in Okeechobee, Florida, pursuant to the attached Exhibit "2", an FBI NCIC arrest record, which was available to the Defendants. Plaintiff also advised said Defendants of this information but was ignored.

B) That Mike Rutherford of 2033 Villa Road, Springfield, Ohio, lived with Steve Ridder at 136 S.E. 68th St., Okeechobee, Florida, both before and after and, in particular on January 5, 1986. Mike Rutherford resided with Bob Mosier at the time the police question him (July-September 1988) and they did not question him about this information when they questioned Mosier. Further, even after the police were provided with same, it was ignored.

C) The Defendants failed to obtain any information concerning Plaintiff's residence and employment at the time of the alleged criminal incidents even though it was readily available to them. Further, even after learning

said exculpatory information, the Defendants ignored it. The information available to them discloses:

1) from 1984 to March 1986, Plaintiff lived at 136 S.E. 68th St.., Okeechobee, Florida, He was with his ex-wife until June of 1984. Mike Rutherford lived with him form Oct/Nov. 1985 until Feb/Mar 1986. He sold the house in March, 1986 as part of his divorce;

   Rutherford now lives at 2033 Villa Rd., Springfield, Ohio with Bob Mosier.

   During this time Plaintiff worked for U.S. Sugar Corp. in Belleglade, Florida as a laborer and foreman, as a ranch hand in Okeechobee for George Goodfellow, and as a house builder for Wesley (lnu) who also worked on the ranch;

2) from March 1986 to May 1986, Plaintiff lived with Jeanie Baker in Okeechobee in a condominium. She owns Hairstyles by Autumn.

   Plaintiff worked for Browns Bros. Equipment in Jupiter, Florida. He had a hernia operation in February, 1986 (hospital records available)

3) from May 1986 until January 1987 Plaintiff lived with his brother, Gary, on Wood Road

in DeWitt, Michigan. He also worked for him in the landscape business;

4) from January 1987 until April 1987, Plaintiff lived in Mason, Michigan in a house owned by his brother, Gary and worked for Gary during this time.

5) In April or May 1987, Plaintiff was traveling through Springfield to visit a family in Florida when he was offered a job by Pete Collier. He moved in with Rutherford and Mosier a t 2033 Villa Rd. for 3-4 months.

From April 1987 to November 1987, Plaintiff worked for Bob Mosier who owns Lawnmasters, lawn care company.

6) From Mid 1987 until July 1988, Plaintiff lived on Lexington Ave., in Springfield with Gayle Poppey and worked for Collier Roofing Company;

7) From February 1987 until 1988, Plaintiff went to work for Collier. He cut this hand in July 1988 and hasn't worked since.

8) From July 1988 to present, Plaintiff has lived with Becky Garrity at his current address (See, Exhibit "3", attached).

D) Therefore, any and all information available to the Springfield Defendants, upon any reasonable inquiry,

would have eliminated the Plaintiff as a potential suspect. The said Defendants failed to so investigate said information both prior to the issuance of the search warrant and afterwards.

E) The affidavit fails to establish any reliability or credibility of the informant who supplied hearsay and hearsay upon hearsay information. No independent investigation was undertaken whatsoever by Defendants to corroborate the inaccurate information.

F) No "duct tape" was carried on trucks which were used by Lawn Mater, as state by Mosier, who also owned the company. The police knew, or should have asked him, as the owner. Certainly, this misinformation by an "informant" is not in conformance with search warrant information requirements.

G) The pre-search warrant photographic display was unlawful, inconsistent with policy and procedures, and was not only unreliable for purposes of obtaining a search warrant, but also tainted the subsequent "line-up" and identification procedure used after arrest.

H) Kim Carr's voice and photographic identification was totally unreliable and any reasonable investigation would have disclosed same.

I) The allegation that Plaintiff had received mental health treatment was erroneous. This was easily verifiable as false.

J) The allegations concerning women, masturbation, and general allegations of sexual misconduct were unsubstantiated, untrue, and without any probable cause.

32. On or after September 7, 1988, as a result of the aforesaid improper investigation and improper and unlawfully issued search warrant, the Plaintiff was caused to be arrested and indicted on fourteen (14) counts. The arrest warrant is attached a Exhibit "4" and incorporated herein as if fully rewritten. The indictment is attached hereto as Exhibit "5" and incorporated herein as if fully rewritten and sets forth the fourteen (14) counts.

33. The aforesaid indictment was issued unlawfully, untruthfully, with reckless indifference to law and procedure, an with actual malice, alleging that the Plaintiff had been guilty of the various State crimes. No reasonable law enforcement officer would have arrested the Plaintiff, or even obtained a search warrant based upon the information available and investigation done as of September 7, 1988. Further, any reasonable officer would have known he was violating the constitutional rights of the Plaintiff.

34. Prior to September 7, 1988 and thereafter, the Defendants Evans, Marcum, Mendah, and Kerr continued to investigate the aforesaid Plaintiff and his acts, conduct, and whereabouts during the alleged crimes. The Defendants had available to them information that he was not even in the State on some of the alleged dates but recklessly ignored same. The Springfield Defendants either refused to listen to said information or refused to obtain and

corroborate same. Said Defendants were totally indifferent to said information.

35. The aforesaid Defendants further failed to investigate the Plaintiff's whereabouts, alibis, and other physical information which proved his innocence. Said acts and omissions were known to, and totally ignored by Defendants, Evans and Schumaker, even though it was their duty pursuant to State Law to actively supervise the investigation and prosecution of Plaintiff's case.

36. Defendant Schumaker, intentionally and with reckless disregard of the law, including the aforementioned constitutional rights of Plaintiff, administered his office so as to prevent and obstruct the release of exculpatory evidence set forth heretofore for which he had a duty to release and, in failing to make known and/or available these facts, unlawfully facilitated the continued arrest and incarceration of Plaintiff.

37. The acts and omissions of Defendant Schumaker, Kelly, Evans, Marcum, Mendah, and Kerr, individually, collectively, and in concert was in furtherance of the custom and unwritten policy as is set forth in paragraph twenty-six (26) (incorporated herein as if fully rewritten) so as to receive the endorsement, approval, and support of the Defendant City of Springfield and Defendant Clark County.

38. The aforesaid conduct violated the constitutional rights of the Plaintiff under the Fourth, Fifth, Eighth, and Fourteenth Amendments and was violation of 42 U.S.C. 1983.

39. Further, the Defendants City of Springfield and Clark County were liable as the governmental entity under which the conduct of the individual Defendants claimed color of state law.

THIRD CAUSE OF ACTION

40. Plaintiff incorporates paragraphs one (1) through thirty-nine (39) as if fully rewritten herein.

41. Defendants Marcum, Mendah, Kerr and Evans, with Defendant Kelly, advised and aided by Defendant Schumaker, individually, collectively and in concert, concealed and failed to reveal exculpatory evidence to courts and Defendants, individually, continued to conceal and obstruct the release and/or gathering of said evidence as is set forth heretofore.

42. Defendant Schumaker further assisted in this concealment and misrepresentation by administering his office in a manner which obstructed obtaining and/or the release of said exculpatory evidence both to the courts and Plaintiff for which Defendant had a duty to reveal.

43. Thereafter, the Defendants sought and obtained and extremely high bond without probable cause, causing the Plaintiff to be unnecessarily incarcerating during the pendency of his criminal prosecution.

44. The unreasonable bond was a violation of the Plaintiff's constitutional rights pursuant to Articles IV, V, VIII, and XIV and under O.R.C. 2937.2 and OR. Cr. P. 46, as well as 42 U.S.C. 1983.

45. Defendants sought, by said high bond, to break Plaintiff's will and faith in the vindication of his innocence so that he would plea bargain to some of the charges, though Defendants know, or should have known, Plaintiff was innocent.

FOURTH CAUSE OF ACTION

46. Plaintiff incorporates paragraphs one (1) through forty-five (45) as if fully rewritten herein.

47. Thereafter, the Defendant, Stephen Schumaker, in the administration of his office, cause great publicity to be made of this arrest and used such publicity in his political campaign to obtain re-election. He did so with actual malice outside the scope of his office and in violation of the Professional Code of Responsibility 7-103 and 7-107.

48. The conduct of the Defendant Schumaker was intentional in that he discussed publicly the purported guilt of the Plaintiff for purposes both of his office and outside of his office (political) but not in furtherance of presentation of this case before the criminal court.

49. The Aforesaid conduct of Mr. Schumaker was in violation of Plaintiff's constitutional rights under the V and XIV Amendments, the duty of a prosecutor to the accused and public under DR 7-103 and 7-107, as well as 42 U.S.C. 1983.

FIFTH CASE OF ACTION

50. Plaintiff incorporates paragraphs one (1) through forty-nine (49) as if fully rewritten herein.

51. The Defendants, thereafter, also subjected the plaintiff to unlawful and improper police line-ups, and had him improperly identified as a potential suspect thereby amassing additional evidence without regard to reasonable inquiry by an objective, reasonable, independent law enforcement officer as required by the duties of the office. Improper aspects included:

A) knowing that no one victim could reliably identify their attacker or with reckless disregard thereof and that they could not identify the person who attacked them, placed all the victims together in a room continuously for one (1) to two (2) hours prior to the line-up.

B) Subjected several of the more suggestible victims to a tainted photo array prior to the line-up.

C) Otherwise constructed the line-up so that Plaintiff would be the most likely one picked.

52. The Defendants (all but Dr. Lawrence and the Clark County Defendants) further attempted to obtain improper admissions and statements from the Plaintiff and attempted to get him to plead guilty to lesser crimes, or a fewer number of crimes, under a plea bargaining arrangement stated that they would, in fact, see that he would not get treated as harshly if he would do so, all the time knowing, yet acting to conceal the facts set forth heretofore.

53. All of the aforesaid investigation was biased and designed not to prove the facts of the case, nor to follow

any leads that were favorable to the Plaintiff or to show his innocence but, instead, to assure a successful criminal prosecution of the Plaintiff who, in fact, t (sic) was innocent of any and all charges. Plaintiff also reasserts the allegations in paragraph 45 as if fully rewritten herein.

54. Such conduct by the Defendants was done with actual malice and without probable cause and did actual harm to the Plaintiff, causing him severe injury which entitles him to compensatory and punitive damages.

55. The Defendants knew, or should have known, that they were unable to conduct a fair and impartial investigation of the Plaintiff after the comments and publicity surrounding same as provided to the news media by the Defendants, and in particular, Stephen Schumaker and they failed to correct their conduct toward the Plaintiff or to, in fact, cease and desist their unlawful conduct.

56. The prosecution and actual incarceration of Plaintiff continued until January 4, 1989. Attached hereto as Exhibit "6" is a copy of a Request for Discovery made by Stephen A. Schumaker wherein it was indicated that this trial was going to proceed and go forward on January 11, 1989. This request is attached hereto and incorporated herein as if fully rewritten.

57. The aforesaid Request for Discovery was made after the prosecutor, Stephen A. Schumaker, and the other Defendants, knew as a matter of fact that the Plaintiff could not possibly have committed the crime because of the DNA testing done. This was later admitted to by the Defendants but they, instead, were still seeking to obtain

some type of plea arrangements or plea agreement whereby the Plaintiff would, indeed, plead guilty.

58. Becky Garrity, an employee of the Clark County Sheriff's Department, has stated that she was told that the DNA results were obtained prior to January 4, 1989. Further, Plaintiff avers he was told directly and indirectly by the Defendants that the DNA test results would be received much sooner than January 4, 1989.

59. At all times material hereto the Defendants knew, or should have known, that the allegations made against the Plaintiff were false and any reasonable person in the Defendant's position would have known that the Plaintiff's constitutional rights were being violated.

60. In the alternative, at some time during the investigation it became undeniable clear that the Plaintiff was, in fact, not guilty of the crime and he still was forced to undergo criminal prosecution and remained incarcerated without probable cause and maliciously detained against his constitutional rights under the V, VIII, and XIV Amendments.

61. The conduct of the Defendants, including but not limited to the activities alleged in paragraphs 7, 11, 21, 26, 31, 36, 37, 45, nd(sic) 51 (incorporated herein as if fully rewritten) and stated hereinafter, violated Title 42 of the United State Code, Section 1983 and other related sections thereunder.

62. As a direct and proximate result of the unlawful conduct of the aforesaid Defendants, as aforesaid,

jointly and severally, the Plaintiff suffered a loss of freedom; malicious criminal prosecution, false arrest, false imprisonment, denial of his constitutional rights to be safe and severe in his person and property, denial of his due process rights, denial of his fundamental rights at critical stages of the investigative fees, loss of his reputation, defamation to his character, damage to his quality of life, emotional and psychiatric injuries, job loss, wage loss, job endangerment, permanent loss of future economic opportunities and employment with a permanent diminishment in earning capacity, and other related damages which are permanent.

63. The aforesaid acts, conduct, omissions and behavior of the aforesaid Defendants was performed knowingly, intentionally, recklessly, totally indifferently, and/or maliciously, by reason of which Plaintiff is entitled to an award of punitive damages, along with all appropriate damages.

SIXTH CAUSE OF ACTION

64. Plaintiff incorporates paragraphs one (1) through sixty-three (63) as if fully rewritten herein.

65. The aforesaid Defendants maliciously, wrongfully, under color of law, and without probable cause, caused the indictment to be issued against the Plaintiff and caused said prosecution to continue against the Plaintiff for the crimes as alleged therein.

66. There was, indeed, a malicious filing of an indictment.

67. There was a lack of probable cause for filing the indictment.

68. The prosecution has been terminated in favor of the Plaintiff pursuant to the attached Exhibit "7" which is an Entry whereby on January 12, 1989, the indictment was dismissed against the Plaintiff.

69. The indictment resulted in Plaintiff's favor.

70. The unlawful acts of the Defendants caused an actual seizure of the Plaintiff's person during the courts of the prosecution.

71. All of the aforesaid acts and conduct resulted in injury and damages to the Plaintiff for which he is entitled to relief in the form of compensatory and punitive damages under State law and pursuant to pendent jurisdiction for malicious prosecution.

SEVENTH CAUSE OF ACTION

72. Plaintiff incorporates paragraphs one (1) through seventy-one (71) as if fully rewritten herein.

73. False arrest and imprisonment resulted from the aforesaid conduct of the aforesaid Defendants by which the Plaintiff was deprived of his physical liberty, more fully described in paragraphs 21, 26, 30, 31, 34, and 51 (incorporated herein as if fully rewritten).

74. The arrest was unlawful and made without probable cause by a person who was authorized to make the

arrest but had reason to believe, or upon reasonable inquiry would have had reason to believe, that the Plaintiff was not guilty of the crime.

75. The arrest was effected under color of law and thereafter the Plaintiff was forced to be incarcerated until January 4, 1989 and subject to prosecution until January 21, 1989.

76. Further, the Plaintiff was caused to be unlawfully falsely imprisoned by his incarceration and, indeed, was continued to be falsely imprisoned as a result of the wrongful conduct of the aforesaid Defendants after they became aware that he was innocent, or after any reasonable person would have become aware of hi innocence.

77. As a result of the unlawful conduct of the Defendants, as aforesaid, the Plaintiff proximately suffered damages for which relief is provided under State law in the form of compensatory and punitive damages and for which relief may be granted hereunder, pursuant to pendent jurisdiction.

EIGHTH CAUSE OF ACTION

78. Plaintiff incorporates paragraphs one (1) through seventy-seven (77) as if fully rewritten herein.

79. The indictments were returned without any type of reliable investigation and were returned based upon conduct of the aforesaid Defendants which fell well below the usual, customary standards of the their office, and indeed, in contravention thereof, or of any other similarly

situated office holder in the jurisdiction of this Honorable Court as set forth.

80. The issuance of said indictment was not only done maliciously and without probable cause but, was an abuse of the criminal process and in direct contravention to the rights of the Plaintiff pursuant to the law and constitutions of the State of Ohio and United States of America.

81. Thereunder, under this investigation, the Defendants did jointly and severally, under color of their office and, at times outside the color of their office, as more fully set forth in paragraphs 21, 26, 30 ,31, 34, 37, 45, and 51 (incorporated herein as if fully rewritten) and perform the following inappropriate activities:

A) Fail to obtain a warrant upon probable cause;

B) Improperly used a photographic display;

C) Improperly conducted police line-ups;

D) Improperly took statements from the Plaintiff and witnesses;

E) Failed to follow-up alibis, defenses, and other available information that showed the innocence of the Plaintiff;

F) Failed to review any and all evidence of mitigation including, but not limited to the DNA reports and FBI NCIC arrest reports in a timely and appropriate manner;

G) The Defendant, Stephen Schumaker, inappropriately, and maliciously, and without probable cause, used the unfortunate circumstances of the Plaintiff improperly to his benefit for political purpose and in violation of his professional responsibilities, both privately and politically.

NINTH CAUSE OF ACTION

82. Plaintiff incorporated paragraphs one (1) through eighty-one (81) as if fully rewritten herein.

83. Prior to September 7, 1989 the Plaintiff had suffered a grievous injury to his hand and was trying to recover from what was a very serious, obvious, and apparent injury.

84. All of the Defendants knew of this medical condition. See attached Exhibit "8" which is a medical receiving form for Plaintiff, received by Defendants.

85. While the Plaintiff was incarcerated, he requested medical treatment in the form of follow-up therapy and treatment for his hand by his treating physician, Dr. Barre and Miami Valley Hospital Physical Therapy Department. He had suffered the injury as a result of a saw, but needed physical therapy on a regular basis in order to recover to as great an extent as possible, the use of the aforesaid hand.

86. The Plaintiff also was in need of immediate further surgeries to his ankle, leg, and hand in order to transplant tissues from his lower extremity to his hand. Time is of the essence for these procedures.

87. The Defendants City of Springfield, Evans, Marcum, Mendah, Kerr, and Schumaker, knew of this medical condition and the failure to treat by all other Defendants and resulting additional aggravation and further injury, as the proximate result of the other Defendants' acts, as hereinafter averred, is also a proximate result of the Defendants Springfield, Evans, Marcum, Mendah, Kerr, and Schumaker, joint and several acts independent and jointly with all other acts and omissions by the other Defendants.

88. Upon incarcerating the Plaintiff in the Clark County Jail, the Clark County Sheriff, Gene A. Kelly, Dr. Walter Lawrence, and Clark County, Ohio had a duty to render to him adequate medical care pursuant to State law (see, paragraph 12).

89. Through the incarceration of the Plaintiff he required constant, timely, and adequate medical care, surgery, physical therapy, exercise, medication, and other treatment for his hand, leg and ankle.

90. Throughout the incarceration, Dr. Barre made known the treatment and follow-up care needed to the Defendant, Dr. Lawrence, and Sheriff Kelly, as did the Plaintiff himself.

91. Even though the aforesaid Defendants knew, or should have known, of the medical condition of the Plaintiff upon incarceration, the surgery subsequent thereto, and the appropriate care and treatment of the Plaintiff, they intentionally, wantonly, and recklessly ignored same which proximately resulted in the loss of function of the Plaintiff's hand, leg, ankle and whole body, causing a permanent disability, pain, suffering, and mental anguish, which is also permanent in nature.

92. Upon being informed of the need for follow-up therapy, the Defendant, Dr. Lawrence, advised the Plaintiff that he would get excellent medical care when he got to prison and not to expect them to take him to Miami Valley Hospital from the Clark County Jail in order to receive treatment. This was stated to the Plaintiff by th Defendant, Dr. Walter Lawrence, who was acting in the course of and arising out of his employment with Clark County, Ohio, and further was acting independently and under his duty and profession as a physician licensed to practice in the State of Ohio.

93. The Defendant, Walter Lawrence, failed to exercise any reasonable degree of care required of a physician of his attainment and failed to provide adequate medical advice, care, and treatment to the Plaintiff and, as a result thereof, the Plaintiff has suffered permanent and grievous injury of a physical nature, as well as emotional pain and suffering because of the permanency of the injury.

94. The aforesaid conduct of the Defendant, Dr. Walter Lawrence, under the authority and direction of the Defendant, Clark County, Sheriff of Clark County, Clark

County Board of County Commissioners, as well as other Defendants who had authority and supervisory capacity over him as law enforcement officers and are liable for the failure to provide adequate medical care and treatment to the Plaintiff.

95. After the Plaintiff had been incarcerated for seven (7) weeks, his condition became so bad that they did, in fact, transport him to Miami Valley Hospital where he received medical care which was too little and too late. The subsequent surgeries to the hand failed. Further, the subsequent surgeries to his left ankle and leg failed because of his inability toe (sic) exercise in his holding cell and the lack of overall follow-up care.

96. The aforesaid conduct was pursuant to a custom and unwritten policy of the Defendant Clark County whereby persons who were arbitrarily pre-determined as likely to be transferred to State prison facilities were withheld or denied special medical treatments so long as possible so as to pass the cost on to the State and so that such costs would not be absorbed by the County.

97. The aforesaid conduct constituted cruel and unusual punishment and a deprivation of the rights of the Plaintiff pursuant to Article VIII and XIV of the United State Constitution and 42 U.S.C. 1983.

98. As a proximate result of the aforesaid unlawful conduct, failure to provide medical treatment, malpractice, cruel and unusual punishment, failure to provide adequate care at a detention facility, as required by State law, as aforesaid (paragraph 12) and the Ohio

Constitution, the Plaintiff suffered severe damages in the form of lost wages, future lost wages, permanent disability, permanent pain, suffering and scarring, and said conditions will continue into the future.

99. The Plaintiff is entitled to relief pursuant to his constitutional violations and 42 U.S.C. 1983, et seq. in the form of compensatory damages because of the failure of Clark County, the Clark County Sheriff, Dr. Walter Lawrence and other Defendants, as aforesaid, to act as any reasonable person in their position as they knew, or were completely reckless and indifferent to the fact they were violating the Plaintiff's constitutional rights under color of State law.

TENTH CAUSE OF ACTION

100. Plaintiff incorporates paragraphs one (1) through ninety-nine (99) as if fully rewritten herein.

101. The Defendants, Walter Lawrence, individually and as an employee of Clark County and the Clark County Sheriff and Clark County, as keepers of the Clark County Jail, are sued jointly and severally pursuant to the State cause of action under medical malpractice pursuant to O.R.C. 2305.11 and 2307.42 as to Walter Lawrence and under the State duties of the other Defendants to provide adequate medical facilities and care to the Plaintiff.

102. The care, treatment and follow-up provided to the Plaintiff was below the standard of care for a physician, jail, jailer, and county in the State of Ohio.

103. As to Walter Lawrence, an affidavit has been submitted expressing an opinion that the aforesaid Walter Lawrence was, at the very least, negligent in his care of Plaintiff.

104. The Sheriff and County failed to properly supervise and control Walter Lawrence and their conduct was in violation of State law as aforesaid (paragraph 12) and was, at the very least, negligent.

105. The conduct of the Defendants, as aforesaid, proximately caused the injuries and damages to Plaintiff.

ELEVENTH CAUSE OF ACTION

106. Plaintiff incorporates paragraphs one (1) through one hundred and five (105) as if fully rewritten herein.

107. The Springfield Defendants and Stephen Schumaker (excepting Dr. Lawrence, Sheriff Kelly and Clark County) jointly and severally issued written and verbal statements asserting that the Plaintiff was guilty of the many crimes for which he was indicted and that he was, indeed, an infamous rapist, and that he would be subject to continued criminal prosecution and incarceration.

108. The Defendants maliciously published, or knew, these defamatory statements would be published or republished to third persons including, but not limited to, the general public and other parties.

109. As a result of the aforesaid malicious publications, virtually every person in the jurisdictional area of the Court became aware, through radio, newspapers, television and personal statements that the Plaintiff was accused of being a rapist and a criminal. There was no doubt that these references were made toward the Plaintiff and that these statements, written, nd (sic) oral, were untrue.

110. All the aforesaid material was false, or should have been know to be false, and was made maliciously. Upon reasonable inquiry there would have been no reason to have made the aforesaid publications.

111. The aforesaid publications were libelous and slanderous per se and the Plaintiff is entitled to compensatory damages of harm to his employment, damages to his future employment, damages to his relationships with others, damages to his general reputation and home life.

112. As a direct and proximate result of the aforesaid false and malicious statements published by the Defendants, the Plaintiff is also entitled to punitive damages.

113. Some of the aforesaid false and malicious statements were made by Stephen Schumaker in order to promote his public career and in violation of the Code of Professional Responsibility, thereby being unprivileged as being in malicious and reckless disregard of the truth.

TWELFTH CAUSE OF ACTION

114. Plaintiff incorporates paragraphs one (1) through one hundred and thirteen (113) as if fully rewritten herein.

115. The Springfield Defendants, as aforesaid, engaged in reckless, wanton, malicious, and/or intentional conduct submitting the Plaintiff herein to an unfair investigation and unfair deprivation of his due process of law.

116. As a proximate result of said investigation, the Plaintiff was subjected to false arrest, false imprisonment, abuse of process and malicious prosecution, as well as other improper conduct toward him.

117. The aforesaid conduct on the part of the Defendants was malicious and in wanton disregard of the Plaintiff's rights.

118. As a direct and proximate result of the Defendants' intentional and/or reckless and/or malicious misconduct, the Plaintiff has suffered severe emotional distress.

119. Said severe emotional distress is permanent in nature and entitles Plaintiff to both compensatory and punitive damages.

THIRTEENTH CAUSE OF ACTION

120. Plaintiff incorporates paragraphs one (1) through one hundred and nineteen (119) as if fully rewritten herein.

121. The Defendant's activity was in consultation with each other and they acted in concert with each other and were mutually aware of information available which indicated the Plaintiff was being inappropriately incarcerated, prosecuted, unlawfully denied medical treatment, and subject to the aforesaid other illegal acts as is more fully et (sic) forth in paragraphs 21, 27, 30 31, 34, 37, 41-45, nd 51-63.

122. All the aforesaid Defendants acted in concert with the other and with knowledge of what the other knew or should have know what other information was available to each other. As such, such constitutional conspiracy to deprive the Plaintiff of his rights under the Ohio and United States Constitutions, State law, and 42 U.S.C. 1981 et seq. (including 42 U.S.C. 1988).

Wherefore, Plaintiff demands judgment, jointly and severally, against the Defendants for TEN MILLION DOLLARS ($10,000,000.00) in compensatory damages and TEN MILLION DOLLARS ($10,000,000.00) in punitive damages, together with pre-judgment interest, post-judgment interest, the Plaintiff's reasonable attorney fees and costs and for such other and further relief to which he may be deemed entitled either at equity or at law.

/s/ Dwight D. Brannon
Dwight D. Brannon (0021657)

BRANNON, GIANUGLOU,
DANKOF & CARAS
Six South Patterson Blvd.
Dayton, Ohio 45402
(513) 228-2306

/s/ Jose M. Lopez
Jose M. Lopez (0019580)
HUFFMAN, LANDIS, WEAKS &
LOPEZ CO., L.P.A.
80 S. Plum St.
Troy, Ohio 45373

Attorney for Plaintiff

JURY DEMAND

Plaintiff respectfully demands a trial by jury on all issues presented herein.

/s/ Dwight D. Brannon
Dwight D. Brannon

/s/ Jose M. Lopez
Jose M. Lopez

AFFIDAVIT

STATE OF OHIO)
)
COUNTY OF MONTGOMERY)

STEPHEN MICHAEL RIDDER, being first duly cautioned and sworn according to law, deposes and states that the foregoing statements are true and correct to the best of his knowledge.

/s/ Stephen Michael Ridder
STEPHEN MICHAEL RIDDER

Sworn to before me, a Notary Public, and subscribed in my presence this /s/ Salli Ann Subler

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel of record by mailing a copy of same this 7th day of May, 1992:

Joseph R. Butz
806 Arcue Bldg.
Springfield, Ohio 45502

John F. Haviland
400 Gem Plaza
Dayton, Ohio 45402

Bradley L. Snyder
37 W. Broad St.
Columbus, Ohio 43215

/s/ Dwight D. Brannon
Dwight D. Brannon

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STEPHEN MICHAEL RIDDER 2825 Nauset St. Springfield, Ohio 45503 Plaintiff vs. CITY OF SPRINGFIELD, OHIO 130 N. Fountain Ave Springfield, Ohio 4550 and CLARK COUNTY, OHIO By and Through the Clark COUNTY BOARD OF COMMISSIONERS 120 N. FOUNTAIN AVE. SPRINGFIELD, OHIO 45502 and STEPHEN A. SCHUMAKER Personally and in his capacity As the Prosecuting Attorney Of Clark County, Ohio And For His Conduct Outside Of His Office As Clark County Prosecutor While Still	*	CASE NO. C-3-90-003 THIRD AMENDED VERIFIED COMPLAINT WITH JURY DEMAND ENDORSED HEREON (Filed June 30, 1992)

Representing Himself Under The *
Color of Law *
120 N. Fountain Ave. *
Springfield, Ohio 45502 *
*
and *
*
GENE A KELLY, Individually *
And In His Capacity As The *
Sheriff of Clark County, Ohio *
120 N. Fountain Ave. *
Springfield, Ohio 45502 *
*
and *
*
ROGER EVANS *
Individually, And In His *
Capacity As Chief of Police of *
Springfield, Ohio *
130 N. Fountain Ave. *
Springfield, Ohio 45502 *
*
and *
*
SGT. ROBERT MARCUM *
Individually, And In His *
Capacity As A Sergeant of *
The Springfield Police *
Department *
130 N. Fountain Ave. *
Springfield, Ohio 45502 *
*
and *

DET. RONALD MENDA
Individually, And In His
Capacity As A Sergeant of
The Springfield Police
Department
130 N. Fountain Ave.
Springfield, Ohio 45502

and

DET. ROBERT KERR
Individually, and In His
Capacity As A Detective of
The Springfield Police
Department
130 N. Fountain Ave.
Springfield, Ohio 45502

and

DR. WALTER LAWRENCE
Individually, and As A
Doctor For the Plaintiff And In
His Capacity As A Doctor For
Clark County, Ohio
5212 Taywell Dr.
Springfield, Ohio 45502

JURISDICTION AND INTRODUCTION

1. These causes of action arise under Title 42 of the United States Code, Section 1983 and all other related sections thereto, including, but not limited to Sections 1985 through 1988, et seq., for violation of Plaintiff's rights under the Fourth Amendment, Fifth Amendment, Eighth Amendment and Fourteenth Amendment to the Constitution of the United States, similar provision of the Ohio Constitution and pendent State claims recognized under Ohio law.

2. This Court has jurisdiction of this case under Title 28 of the United States Code, Section 1343, the constitutional questions presented, and all other bases of jurisdiction , including pendent jurisdiction of the court.

3. At all times material hereto, the Plaintiff, STEPHEN MICHAEL RIDDER, has been domiciled in Clark County, Ohio, in the Southern District of Ohio, Western Division. The Defendants, individually, jointly and severally, are alleged to have known, or should have known, that they were violating the civil rights of the Plaintiff under clearly established federal and State law. The acts violated clearly established statutory or constitutional rights of the Plaintiff for which any reasonable person similarly situated to the Defendants, individually, jointly and severally, would have known or, should have known would result in the deprivations to the Plaintiff and the proximate resulting damage.

5. The CITY OF SPRINGFIELD, Clark County, Ohio, is a municipal corporation and governmental subdivision of the State of Ohio if which the SPRINGFIELD CITY POLICE DEPARTMENT is a part

thereof. The City is sued for the acts or omissions of its chief of police and other policy making officers in failing to promulgate clearly defined policies and procedures so as to proven the deprivation of constitutional and statutory rights of the Plaintiff. Further, the City failed to train or otherwise provide adequate training for the officers of its police department, including, without limitation, those named as Defendants herein. The City is also responsible for some causes of action hereinafter plead under the doctrine of respondeat superior.

6. The COUNTY OF CLARK, STATE OF OHIO, by and through the Clark County Board of County Commissioners is a governmental subdivision of the State of Ohio of which the Clark County Sheriff's Department is a part. The Clark County Board of County Commissioners has the responsibility to provide funds and assure that prisoners receive appropriate medical treatment while incarcerated pursuant to R. C. 341.01, et seq., R. C. 341.07, R. C. 5120.10 and Ohio Admin. Code, Section 5120: 1-7-01, et seq., and policies promulgated by the jail, attached hereto and incorporated herein as Ex.1. These policies indicate the existence of an agreement, a copy of which Plaintiff does not have, between the Board of Commissioners, Sheriff and physician, to maintain proper medical services.

7. The Defendant, STEPHEN A. SCHUMAKER, at all times material hereto was employed by Clark County, State of Ohio, as the Prosecuting Attorney This action is being taken for his wanton, willful, reckless, and/or grossly negligent conduct, both in his capacity as Prosecuting Attorney wherein he enjoys qualified immunity,

and outside the conduct of his office as Prosecutor for conduct that was taken negligently, grossly negligently, recklessly, wantonly, or willfully outside the scope of the judicial phase of prosecutorial duties and for advising and participating in the investigation and incarceration of Plaintiff in violation of his aforementioned constitutional and statutory rights. Further by assisting in the preparation, drafting and thereafter, obtaining approval of a false affidavit, used to procure a warrant against Plaintiff which, had the true material facts known at the time been presented to the judge, the material omissions included, or the truth of the averments been ascertained by reasonable diligence, then said warrant would not have been issued; and further by administering his office so as to continue Plaintiff's incarceration, Defendant Schumaker with other Defendants described herein, acting or failing to act while supervising in said investigation, violated clearly established statutory and constitutional rights of which he was aware or, but for a total abdication of duty would have been aware, as any reasonable prosecutor would be aware.

8. The Defendant, DR. WALTER LAWRENCE, is a medical doctor licensed to practice medicine in the State of Ohio and, as such, was in charge of delivering medical care and treatment in the Clark County Jail at all times relevant to the case at bar and, in particular, responsible to deliver the appropriate care and treatment to the Plaintiff in the case at bar. Dr. Lawrence is sued in his capacity as a joint employee and agent of Sheriff Kelly and Clark County, Ohio, employed by its Board of Commissioners and also individually as a medical doctor, for his conduct as hereinafter alleged whereby he knew or should have known he violated the clearly established

statutory and constitutional rights of the Plaintiff by violating the provisions of Ohio Admin. Code, Section 5120:1-7-01, et seq. (in particular, Section 5120: 1-8-09), a complete copy of which is attached hereto as Ex. 2, R.C. 341.01, et seq., the Ohio Constitution and the United States Constitution for willfully, wantonly, grossly negligently and negligently failing to provide medical treatment. He also violated State law in failing to provide and/or improperly providing said medical treatment.

9. The Defendant, SHERIFF GENE A. KELLY, was at all times pertinent hereto in charge of the Clark County Jail and in charge of the prisoners incarcerated therein, including the Plaintiff, from September 8, 1988 to January 4, 1989. Sheriff Kelly was responsible for Plaintiff's care, treatment, control, as well as required to provide all appropriate medical services to plaintiff. The violation of the attached policies, as well as the aforesaid clearly established statutory laws of Ohio and aforesaid constitutional provisions were perpetrated by Sheriff Kelly when he knew or should have known of the violations. It, further was directly by the Defendant, Gene A. Kelly, that the Plaintiff continued to be falsely incarcerated, imprisoned, denied appropriate medical care and treatment, and prosecuted, as hereinafter set forth. Sheriff Kelly was also responsible for promulgating written rules to the personnel employed by him and the County at the jail so as to provide adequate medical treatment and to see that grievances, complaints, and exculpatory information was transmitted form prisoners to himself and disseminated as justice required. The Sheriff knew, or should have known, that his failure to perform his duties as averred hereinafter would result in the violation of the clearly established constitutional

and statutory rights of the Plaintiff, as ultimately was the case. Sheriff Kelly is sued as an individual and in his capacity as the Clark County Sheriff.

10. The Defendant, ROGER EVANS, was the Chief of Police of Springfield, Ohio and directly in charge of the training, supervision and actual performance of police personnel, including issuance of warrants, conducting line-ups, pre-arrest investigations, post arrest investigations, coordination of persecutions an incarcerations pursuant to the City Charter an R.C. 737.05, et seq. Defendant Evans was in charge of these matters concerning the Plaintiff from some time before September 8, 1988 until January 10, 1989 when an Entry of Dismissal was journalized in the Clark County Court of Common Pleas. Defendant Evans was also a maker of policy on behalf of the City of Springfield in regards to the aforesaid matters. Roger Evans is sued individually and in his capacity as Chief of Police for his failure to properly implement procedures, training, supervision and investigation in the aforesaid functions concerning Plaintiff. Defendant Evans knew or should have known that he violated clearly established statutory and constitutional rights of the Plaintiff and/or abdicated his responsibilities to such an extent in regards to Plaintiff that he was grossly negligent, reckless, willful or wanton. The aforementioned policies of Defendant Evans and the Springfield Police Department that affected the Plaintiff's rights were also the policies of the City of Springfield.

11. The Defendants, SGT. ROBERT MARCUM, DET. RONALD MENDA, and DET. ROBERT KERR were at all times employed as police officers and

acting under the color of State law in their employment as police officers for the City of Springfield and, also, upon information and belief on occasion, outside the proper scope of their employment as police officers. Defendants, Marcum, Menda and Kerr, individually and in concert, failed to properly investigate the allegations against the Plaintiff, ignored exculpatory evidence of innocence, unlawfully predisposed their attitudes in their official duties against the Plaintiff, omitted material facts, misrepresented material facts, conducted line-ups and other incriminating procedures against Plaintiff in such a manner that they knew they were violating clearly established statutory and or constitutional rights concerning these phases of the criminal process of which any officer would have been aware or should have known. Further, this conduct continued when Defendants Marcum, Menda, Kerr, and Kelly knowingly ignored their statutory duties to timely take notice of information, facts and evidence which exonerated the Plaintiff of any wrongdoing. Defendants Marcum, Menda, Kerr and Kelly made material allegations which they knew were false and misleading and/or concealed, omitted and otherwise failed to disclose critical and/or exculpatory facts known to them, intentionally and/or with reckless disregard and/or deliberate indifference of the aforementioned clearly established constitutional and statutory rights of Plaintiff, and were otherwise in violation of duties imposed upon them under the law of Ohio and/or through written policies to which they are subject, (or for which policies should have been promulgated) for the purpose of preventing, ceasing, or ameliorating the unlawful conduct toward the Plaintiff as hereinafter alleged. Defendants Evans, Marcum, Menda, Kerr and Kelly are sued both in their capacity as police officers and individually.

12. Defendants, Evans, Marcum, Menda and Kerr jointly and severally, knowingly failed to observe the Springfield City written policy, departmental rules, regulations, overall policies and procedures, and proper customs, as well as the constitutional and statutory provisions and case law for, among other matters:

A) The investigation of alleged criminal conduct by Plaintiff.

B) Obtaining and alleging sufficient information to establish probable cause for a search warrant, including independent objective investigation to determine the truth o of any informant's information or conclusionary statements of truth by others to prepare affidavits in support of warrants, which set forth true facts without material misstatement or omissions.

C) Reviewing Defendants' statements and alibis for truthfulness as part of the preliminary, as well as on-going, investigatory procedures.

D) Conducting photographic spreads and identifications through photographs.

E) Conducting fair and impartial line-ups and in-person identification of potential defendants by victims of crimes.

F) Following mandatory investigatory procedures after arrest, including reviewing statements favorable to defendants, alibi information and other exculpatory evidence.

G) Failing to timely process and/or release critical forensic information and tests (including DNA matters) within a reasonable time.

H) Ignoring or showing a willful indifference to evidence or innocence and the rights of the accused.

I) Violation of R. C. 2933.22, et seq, R.C. 2935.01, et seq. and Ohio Rules of Criminal Procedure, Rules 4 and 41, all actionable through R.C. 2307.60 as well as 42 U.S.C. 1983, et seq.

J) Providing truthful, complete affidavits and testimony to the Court.

K) Failing to utilize inter-police agency cooperation and information which they knew to exist and which would have exonerated the Plaintiff.

L) The provisions of Amendments IV, V, VIII, XIV of the United States Constitution and corresponding Ohio constitutional provisions were ignored, together with the clear case law interpreting same.

13. The Defendant Schumaker supervised Defendants in the activities averred in paragraph 12, supra.

14) The Defendants, Sheriff Kelly, Dr. Lawrence and Clark County are jointly and severally liable to the Plaintiff for the violation of his clearly established statutory and constitutional rights. The conduct of defendants Kelly, Lawrence and Clark County includes, but is not limited to:

A) violation of R.C. 5120.10 et seq., R.C. 341.01, et seq., R.C. 341.07 and the Ohio Administrative Code, Sections 5120:1-7-01, et seq. (and, in particular, Section 5120:1-8-09) and established procedures.

B) Violation of written policies and procedures of the Clark County Sheriff and the employees of Clark County jail for negligently, grossly negligently, recklessly, wantonly and willfully failing to provide appropriate examinations, over his entire period of incarceration even though they knew of his medical needs.

C) Violation by Dr. Lawrence, both independently as a physician and as a joint employee of Sheriff Kelly and Clark County, of the accepted and recognized standard of care for medical treatment of the Plaintiff.

D) For the willful indifference and on-going violation of policies, procedures, regulations, State law and health standards applicable to the Plaintiff which were known to Clark County, Sheriff Kelly, and employees of the Clark County Sheriff's Department and, in particular, the jail (all of whom are agents of the Sheriff and County).

E) For the willful indifference to medical treatment and follow-up care as indicated by the Plaintiff's treating physician, Dr. Barre, including but not limited to failure to provide

prescribed medication, therapy, follow-up procedure and other required medical services at the expense of the county.
All in violation of state and constitutional law and policy.

f) Violation of Amendment VIII of the United States Constitution.

15. The Defendant, Sheriff Kelly, is also liable to the Plaintiff for his willful failure, personally and through his deputies, to accept grievances, information, medical requests and other matters from the Plaintiff that would have mitigated his various injuries, as averred herein. Further, had the sheriff established and/or carried out his duties under the Administrative Code, attached hereto, in regards to the information provided by the Plaintiff, the Plaintiff would not have continued to be denied his constitutional and statutory rights. These clear violations were reasonably foreseeable by the said Sheriff.

16. The Defendant Prosecutor, Schumaker's willful indifference and knowing failure to timely process all the evidence presented to him to prove the Plaintiff innocent and his failure to timely dismiss charges thereupon, as well as the misuse of Plaintiff's circumstances for political advantage contrary to 7-103 of the Code of Professional Responsibility as promulgated by the Ohio Supreme Court and as a minimum standard of care owed to an accused violated clearly established, constitutional and statutory duties, including but not limited to R.C. 309.08, R. C. 309.09 (adviser to Defendants, County Board of

Commissioners and Sheriff, as well as an adviser to all the Defendants, except the City of Springfield), statutory and constitutional rights of the Plaintiff under Amendments IV,V,VIII, and XIV of the United States Constitution.

17. The Defendant Clark County is responsible for providing funds, overseeing the maintenance of the jail and seeing that prisoners, including the Plaintiff, are provided adequate medical care within the standard of care clearly established by statute, constitution and law. Further, the County is responsible for the payment of the investigative expenses of the prosecutor's office, including timely DNA and other tests for investigative purposes. The failure of the County to oversee these functions of the aforesaid Defendants and their willful indifference to the performance of same, violates the clearly established constitutional and statutory rights of the Plaintiff.

18. The Defendant City of Springfield is also liable under the State and federal law for those acts of its police chief and officers alleged herein which are willful, wanton, reckless, or grossly negligent. Further, the City has a legal duty to see the necessary policies are in force to adequately protect the Plaintiff from exactly the harm he came to suffer as a result of deprivation of clearly established rights.

19. All causes of action arising under State law are brought pursuant to the pendent jurisdiction of this Court.

20. At all time relevant to the mattes alleged hereinafter, the Plaintiff was a citizen of the United States of America, without disability relating to his citizenship, and thereby entitled to all the privileges, immunities, freedoms and rights to the pursuit of happiness afforded him under clearly established statutory and constitutional provisions of law without unlawful interference with said rights by the Defendants, either jointly or severally. The Plaintiff was also indigent and required to obtain the services of a public defender. As a part of the aforesaid class of indigent persons, the Plaintiff was denied his clearly established statutory and constitutional rights by the Defendants, jointly and severally.

21. The acts of each of the Defendants set forth herein above were under the color of law and pretense of statutes, ordinances, regulations, customs and usages of the State of Ohio and under the purported authority of the offices they held.

22. The aforesaid conduct of all the Defendants was done knowingly, intentionally, willfully, wantonly, grossly negligently, negligently, recklessly and/or with total indifference as to the lawful rights of the Plaintiff, and/or all the Defendants acted in such a manner that was contrary to any reasonable person in the position would have acted because they knew, or should have known, that they were violating Plaintiff's clearly delineated constitutional and/or statutory rights.

23. The defendants, City of Springfield, Marcum, Menda, Kerr, Evans and are also jointly and severally liable to the Plaintiff for any and all wrongful conduct of the Defendants, Sheriff Kelly, Dr. Walter Lawrence and Clark County, Ohio as the physical and emotional damages proximately suffered by the Plaintiff after arrest and incarceration due to the violation of his clearly established constitutional and statutory rights; all of which was reasonable foreseeable by all the aforesaid Defendants, even if some Defendants were no longer actively detaining the Plaintiff while other Defendants were.

FIRST CAUSE OF ACTION

24. Plaintiff incorporates paragraphs one (1) through twenty three (23) as if fully rewritten herein.

25. This cause of action is brought under federal law for deprivation of Plaintiff's statutory and constitutional rights as set forth in paragraphs one through twenty four. The action also arose under 42 U.S.C. 1983 et seq., including 42 U.S.C. 1985, because Plaintiff belongs to a class of indigents.

26. On or about July 8, 1988 the Defendants, Schumaker, Menda, Marcum, Kerr and Evans (the First Count Defendants, hereafter denominated "1CD". Hereinafter the second Count Defendants will be denominated "2CD", etc.) began an investigation of the Plaintiff for numerous rape offenses, which had been previously committed, and investigated by the 1CD, or other law enforcement officials of Ohio who had provided investigatory information concerning said crimes to these Defendants.

27. The 1CD were charged with possessing the knowledge and skills of like and similarly situated public officers, including the duty to adequately investigate and evaluate information and circumstances of an alleged rape. This included knowledge of the inherent unreliability of identification testimony of victims, as well as other unique characteristics of such investigators.

28. The 1CD received information form one Kim Carr concerning the alleged criminal conduct of Plaintiff;

39. The aforesaid information from Kim Carr was false, unbelievable and inadmissible. Any reasonable public officer would have known it to be unreliable, false and inadmissible for any judicial purpose including for use in an affidavit for a search warrant. A summary of her representations are contained in Exhibit "3" attached hereto and incorporated herein. The obvious discrepancies included, but are not limited to:

A) No actual rape (the only alleged victim to halve not been raped or fondled).

B) Allegedly attacked twice, on two separate occasions, without a rape occurring.

C) Alleged that he attacker was unable to achieve an erection on both occasions.

D) Waited approximately three hours on each of the tow alleged attacks to call the police.

E) Carr alleged she had a gun and when this didn't see her assailant, she attempted to shoot him but he gun misfired (No averment that the police obtained the gun, or ammunition, to corroborate this statement).

F) Carr had also reported a burglary at her house on 6/11/86 (between the 6/8/86 and 7/19/86 alleged attacks.

G) Carr state she positively couldn't I.D. the suspect, even though she had the most exposure.

H) Other obvious discrepancies that would alert anyone, especially trained public officials, that the information was untrue.

30. The aforesaid 1CD knew that the information was unreliable false and inadmissible but proceeded to unfairly target the Plaintiff as a suspect, all in contradiction to his clearly established statutory and constitutional rights, which 1CD knew were afforded to Plaintiff. The 1CD violated laws and constitutional provisions which regulated their conduct.

31. Based solely upon the aforesaid false foundation, the 1CD developed further false information concerning the Plaintiff, which was averred in the search warrant, the particulars of which are set forth in the Second Count hereafter and are alleged as if fully rewritten. The 1CD are the same as the 2CD.

32. The aforesaid inadequate, unreliable and improper investigations, as to scope, method, manner and conclusions resulted in the issuance of the search warrant attached hereto as Exhibit "4", the proximate resulting arrest and all other resulting harm to the Plaintiff as hereinafter averred.

33. In reality the entire proximately resulting denial of the statutory and constitutional rights were initiated solely from the information provided by Kim Carr, along with the total failure of adequate investigation, and proximately resulted in the failure of 1CD to adequately protect the constitutional and statutory rights of Plaintiff.;

34. The 1CD realized or should have realized this obvious flaw in the investigation at some point thereafter but failed to remedy same, or were determined to continue the prosecution to avoid accountability for the initial misconduct.

35. As a proximate result of the wrongful conduct of the 1CD, individually, jointly and severally, the Plaintiff proximately suffered economic, psychological, physical and related injuries for which he is entitled to recover compensatory, punitive and other damages, including attorney fees, costs and interest.

SECOND CAUSE OF ACTION

36. Plaintiff incorporates paragraphs one (1) through thirty five (35) as if fully rewritten herein.

37. On or about September 7, 1988 the Defendants, Schumaker, Marcum, Menda, Kerr, and Evans, (hereafter "2CD" collectively) wrongfully, unlawfully, untruthfully and without probable cause, knowingly caused a search warrant to be issued alleging that the Plaintiff was a rapist and guilty of numerous acts of criminal conduct. A copy of the aforesaid search warrant is attached hereto and incorporated herein as if fully rewritten as Exhibit "4".

38. The Plaintiff seeks relief pursuant to 42 U.S.C. 1983, et seq., in this cause of action for violation of clearly established law concerning the issuance of search warrants and investigations before, during and after the invocation of judicial process. Also, the violations of statutes and constitutional provisions as outlined in paragraph twelve (12) are specifically reaverred herein as against the 2CD.

39. The search warrant was issued to and based solely upon an affidavit attached as Exhibit "5". This affidavit was knowingly drafted and designed to fabricate probable cause by containing information which Defendants knew, or should upon any preliminary inquiry have known, was false and/or misleading while also omitting other critical and/or exculpatory known facts with foreknowledge that had these true facts been presented and/or the hidden facts revealed, there would not have been probable cause to issue the above search warrant so that no warrant would have been

issued and/or additional investigation conducted which would have revealed Plaintiff's innocence without significant violation of Plaintiff's clearly established constitutional, statutory and/or common law rights with the proximately resulting damages as hereinafter alleged.

40. Attached hereto as Exhibit "6" and incorporated is a summary of the information contained in the search warrant affidavit and the obvious discrepancies. The false, misleading and/or omitted statements include but are not limited to the following facts which were known individually and collectively to the affiant, investigators, 1CD, realigned herein as the 2CD and other who assisted in drafting the affidavit and procured said warrant.

A) While representing that a series of rapes and attacks with a distinct pattern likely committed by the same individual (so that elimination of a suspect from one or more would have likely eliminated him as a suspect in the others) failed to reveal that their investigation disclosed that during several of these rapes, Plaintiff was, in fact, in another state and during one, was in a Florida jail for a minor infraction. This information was immediately available to the 2CD, a later copy which is attached as Exhibit 7, and the 2CD knew the contents of the criminal record of the Plaintiff which contained said information. Any reasonable officer would not have ignored this information which resulted in the violation of Plaintiff's constitutional and statutory rights.

B) Failed to reveal that the victims were either blind folded, attacked in the dark, approached form the rear, or attacked under other circumstances which prevented

them from clearly seeing their attacker's face or otherwise impairing their ability to render a reliable positive identification. The victims reported this to the 2CD, or it was known to them.

C) Failed to disclose that the rapist's hair was brown, while Plaintiff's was, and is blond.

D) With regards to the attack on Katherine Davis on January 5, 1986 (Affidavit, page 1 paragraph 3):

1) Presented part of her description of her attacked but omitted that she reported him to be 5'2" with dark hair.

2) Failed to disclose that the police background check referred to in affidavit at page 3, paragraph 2) revealed that a person identified as Plaintiff was in a Florida jail on the night of the attack.

3) Referred to a green International Scout seen near the attack but failed to mention Plaintiff neither owned nor had access to such a vehicle.

4) Doubtful identification of suspect.

E) With regards to the June 8, 1996 attack on Kim Carr (Affidavit, page 1, paragraph 4):

1) Failed to mention that the alleged victim stated that she could not visually identify her attacker.

2) That Plaintiff was still working in Michigan at the time of this attack and was not otherwise reported in the area.

3) That the attacker was initially reported to have brown hair and a mustache but omitted that Plaintiff has light blond hair and is clean shaven.

4) Could not reliably be expected to identify her attacker, visually or otherwise.

5) All averments set forth in paragraph 29, supra, which are incorporated herein as if fully rewritten.

G) With regards to the June 23, 1987 attack on Judy Sutton (affidavit omitted):

1) She could not visually or otherwise reliably identify her attacker.

2) Seriously scratched the face of her attacker and Plaintiff was not reported to have such scratches at or around the time of this attack, nor any remnants of same.

3) With regards to the means of attack and use of duct tape, see paragraph "P" below, which avers that the victim never reported the use of duct tape but the affiant, Defendant Menda did.

H) With regards to the attack on July 14, 1987 (Terry Tinkler) and August 2, 1987 (Jill Ault) (Affidavit, page 2 paragraph 1):

1) Omitted that they reported a description of the attacker which differed from Plaintiff in material aspects including reporting a receding hairline whereas Plaintiff has a full head of hair.

2) Omitted that these victims did not view the attacker for a sufficient time or under circumstances from which a reliable identification could be expected.

3) As to the method of attack and use of duct tape, see paragraph "P" below.

I) As to the September 3,, 1987 attack on Mary Phillips (Affidavit, page 2, paragraph 3):

1) Omitted that she knew Plaintiff (she is Becky Garrity's cousin, and had met him before) and saw him after (and before) the rape but did not accuse or identify him as the attacker (visually or by voice) or even insinuate that he might have been the attacker.

2) She could not physically describe the attacker on the night of the rape.

J) As to the June 27, 1987 attack on a Sidney woman (Affidavit, page 2, paragraph 5), later identified as Celena Lovett:

1) Omitted that on the night of the rape she could not provide a physical description of her attacker and did not see him.

2) As to the duct tape see paragraph "P" below.

K) As to the October 18, 1987 attack on another Sidney woman (Affidavit, page 2, paragraph 6):

1) Omitted that the victim insisted that she could not identify her attacker under any circumstances and told affiant and other investigators this prior to the affidavit.

2) That no evidence whatsoever was preserved.

L) As to the July 5, 1988 Wapakoneta rape (Affidavit, page 2, paragraph 7):

1) Failed to reveal the attacker did not have a chipped tooth but Plaintiff did.

2) That she was otherwise unable to provide a reliable positive identification of the attacker.

3) That the police investigation revealed reports that Plaintiff, when the attack occurred, was in the company of others including Plaintiff's live-in girlfriend (who is employed with the Clark County jail).

M) As to individual noted on page 2, paragraph 8 of the affidavit, who purportedly told the police that Plaintiff was camping near Wapakoneta on the night of the July 5th rape and who police failed to identify and/or reveal his reliability:

1) That the information was unreliably obtained.

2) That Plaintiff was camping with his girlfriend.

N) As to the informant purported on page 3, paragraph 1 of the affidavit, whom affiant failed to identify or reveal reliability:

1) Misrepresented numerous facts including, but not limited to , the fact that Plaintiff had several girlfriends during the time of the rapes, including a steady girlfriend since July 4, 1988, with whom he was living, that after a four year absence Plaintiff returned to the Springfield area in April 1987, a year and four (4) months after the attacks started.

2) Omitted that the information was not reliably obtained.

3) Misrepresented Plaintiff's presence in the area.

5) That Plaintiff, during the course of his employment, did not service any property near a victim at or around the time of the attack.

6) Failed to reveal that several material characteristics attributed to the attacker did not reflect Plaintiff's appearance including, but not limited to hair color and receding hair line.

7) Plaintiff was not fired from his lawn service job.

O) As to the Florida background check reported on page 3, paragraph 2 of the affidavit, affiant failed to reveal that he check also disclosed that Plaintiff continued to live in Florida through May, 1986 and was in jail there for a minor offense during one of the serial rapes and that form Florida, Plaintiff moved to Michigan until he returned to Springfield in April, 1987.

P) As to page 3, paragraph 4, of the affidavit, affiant falsified what was told to him and investigators by a "company official":

1) The company official did <u>not</u> state Plaintiff carried duct tape but rather insisted that Plaintiff did <u>not</u> carry duct tape and noted that duct tape was <u>not</u> used to repair hose leaks on the job as company hoses were under great pressure.

2) Company official did <u>not</u> state that Plaintiff had account in the Sidney area in the Summer/Fall of 1987 but, rather, provided records which clearly showed that Plaintiff was in the Sidney area only on a single Saturday morning, that he returned promptly in the afternoon and that this was not on the day of any rape.

3) Affidavit omitted that Plaintiff's job records provided by the company official revealed that any proximity to the location of any rape was not near the time of the occurrence.

4) Omitted that Plaintiff's date of hire (4/3/87) was his first day returning to the area after a four (4) year absence.

Q) As to claims asserted on page 3, paragraph 5 of the affidavit, failed to reveal that due to the circumstances of the rapes noted herein especially that due to darkness, lack of visual contact or, at best, a brief fleeting glance and the stress of their attack and other circumstances of the attack, that note of these victims could be expected to provide a reliable positive identification.

1) Omitted evidence revealing that the alleged victim Kim Carr had seen Plaintiff after the alleged attempted rape while Plaintiff was at the hospital where she worked and that she could not visually identify Plaintiff as her attacker.

2) That at the time Plaintiff was in said hospital, his hand was severed, he was suffering extreme pain, was under medication, and was in stress and shock and under the circumstances when Ms. Carr heard his voice for a brief period and

thought it sounded "something like' the person who allegedly attacked her almost two years prior but could not identify Plaintiff as her attacker.

3) That Ms. Carr's identification through "process of elimination" was based upon said hospital contact and a photo spread which included an arrest photo of Plaintiff and was otherwise tainted, as averred hereinafter.

4) Failed to reveal that no physical (e.g., body samples) evidence was recovered form the attack on Ms. Carr which could otherwise identify anyone as the attacker.

5) Omitted that the other tow victims whose indication of a resemblance suffered from a suggestive photo spread and could not be expected to provide reliable identification due to the circumstances of the attack, as averred hereinafter.

6) That Katherine Davis originally identified her attacker as 5'2" with dark hair (Plaintiff is 5' 11" with blond hair).

7) That the rape of Katherine Davis occurred while Plaintiff was in a Florida jail.

8) Other omissions and misstatement set forth in items B,C,D,E and G above in this paragraph.

41) Other information available and known by the 2CD but, deliberately ignored included, but is not limited to, the following:

A) That on or about January 5, 1986, the date of the first alleged crime, the Plaintiff was incarcerated in Okeechobee, Florida, pursuant to the attached Exhibit "7', an FBI NCIC arrest record, which was available to the 2CD. Plaintiff also advised 2CD of this information but was ignored.

B) That Mike Rutherford of 2033 Villa Road, Springfield, Ohio, lived with Steve Ridder at 136 S.E. 68th St., Okeechobee, Florida, both before and after and, in particular on January 5, 1986. Mike Rutherford resided with Bob Mosier at the time the police questioned him (July-September 1988) and they did not question him about this information when they questioned Mosier. Further, even after the police were provided with same, it was ignored.

C) The 2CD failed to obtain any information concerning Plaintiff's residence and employment at the time of the alleged criminal incidents even thought it was readily available to them. Further, even after learning

said exculpatory information, the Defendants ignored it. The information available to them discloses:

1) From 1984 to March 1986, Plaintiff lived at 136 S.E. 68th St., Okeechobee, Florida. He was with his ex-wife until June of 1984. Mike Rutherford lived with him from Oct/Nov. 1985 until Feb/Mar 1986. He sold the house in March, 1986 as part of his divorce;

Rutherford now lives at 2033 Cilla Rd., Springfield, Ohio with Bob Mosier.

During this time Plaintiff worked for U.S. Sugar Corp. in Belleglade, Florida as a laborer and foreman, as a ranch hand in Okeechobee for George Goodfellow, and as a house builder Wesley (lnu) who also worked on the ranch.

2) From March 1986 to May 1986, Plaintiff lived with Jeanie Baker in Okeechobee in a condominium. She owns Hairstyles by Autumn. Plaintiff worked for Browns Bros. Equipment in Jupiter, Florida. He had a hernia operation in February, 1986 (hospital records available).

3) From May 1986 until January 1987 Plaintiff lived with his brother, Gary, on Wood Road in DeWitt, Michigan. He also worked for him in the landscape business.

4) From January 1987 until April 1987, Plaintiff lived in Mason, Michigan in a house owned by his brother, Gary and worked for Gary during this time.

5) In April or May 1987, Plaintiff was traveling through Springfield to visit a family in Florida when he was offered a job by Pete Collier. He moved in with Rutherford and Mosier at 2033 Villa Rd. for 3-4 months.

6) Form April to November 1987, Plaintiff worked for Bob Mosier who ones Lawnmasters, a lawn care company.

7) From mid 1987 until July 1988, Plaintiff lived on Lexington Ave., in Springfield with Gayle Poppey and worked for Collier Roofing Company.

8) From February 1987 until July 1988, Plaintiff went to work for

Collier. He cut this hand in July 1988 and hasn't worked since.

9) From July 1988 to present, Plaintiff has lived with Becky Garrote at his current address (See, Exhibit "8", attached).

D) Therefore, any and all information available to the 2CD, upon any reasonable inquiry, would have eliminated the Plaintiff as a potential suspect. The said 2CD failed to so investigate said information both prior to the issuance of the search warrant and afterwards.

E) The affidavit fails to establish any reliability or credibility of the information who supplied hearsay and hearsay upon hearsay information. No independent investigation was undertaken whatsoever by 2CD to corroborate the inaccurate information.

F) No "duct tape" was carried on trucks which were used by Lawn Masters, as stated by Bob Mosier, who also owned the company. the police knew, or should have asked him, as the owner. Certainly, this misinformation by an "informant" is not in conformance with search warrant information requirements.

G) The pre-search warrant photographic display was unlawful, inconsistent with policy and procedures, and was not only unreliable for purposes of obtaining a search warrant, but also tainted the subsequent "line-up" and identification procedure used after arrest.

H) Kim Carr's voice and photographic identification was totally unreliable and any reasonable investigation would have disclosed same. Kim Carr's vague voice identification was really the only impetus for the warrant and so tainted the officers' objectivity that they ignored all other information.

I) The allegation that Plaintiff had received mental health treatment was erroneous. This was easily verifiable as false.

J) The allegations concerning women, masturbation, and general allegations of sexual misconduct were unsubstantiated, untrue, and without any probable cause as to their existence by any reasonable officer.

42. Defendants Marcum, Menda and Kerr, individually or collectively, participated in the preparation, drafting, swearing, and presentation of the affidavit with foreknowledge of its falsity and omissions set forth above.

43. Defendant advised, supervised and/or participated in the investigation and drafting and approved the affidavit with foreknowledge of its falsity and material omissions.

44. Defendant Evans supervised, advised and/or participated in the investigation and drafting and approved the affidavit with knowledge of its falsity and material omissions. the 2CD either violated procedures or none existed to prohibit the violation of clearly established statutory and constitutional law.

45. Individually, collectively, and in concert, each of the 2CD knew, or should have known, that had the true facts known to them been represented in said affidavit, that a warrant could not have been obtained as probable cause would have been lacking but, none the less, intentionally or with reckless disregard of Plaintiff's aforementioned constitutional rights, violated said rights under color of law by falsely obtaining a warrant proximately causing the violation of clearly established statutory and constitutional law and proximately resulting injury to the Plaintiff.

46. The 2CD knew that they should continue the investigation in order to avoid violating the Plaintiff's statutory and constitutional rights but deliberately terminated same and failed to re-investigate upon being presented with evidence that he Plaintiff was innocent.

47. The search warrant was issued in violation of the Plaintiff's constitutional and statutory rights under the Fourth, Fifth and Fourteenth Amendments, as well as contrary to the statutory law, policies, customs and procedures as aforesaid, and as set forth in paragraph twelve (12), heretofore and reincorporated herein.

48. As a proximate result of the wrongful conduct of the 2CD, the Plaintiff proximately suffered economic, psychological, physical and related injuries for which he is entitled to recover compensatory, punitive and other damages, including attorney fees, costs and interest.

THIRD CAUSE OF ACTION

49. Plaintiff incorporates paragraphs one (1) through forty eight (48) as if fully rewritten herein.

50. This cause of action seeks relief for the violation of Plaintiff's rights under 42 U.S.C. 1983, et seq, and 42 U.S.C. 1985, together with the violations of constitutional and statutory law set forth in paragraph twelve (12), supra, including Amendments IV,V, VI, VIII, XIV of the United States Constitution.

51. On or after September 7, 1988, as a result of the aforesaid improper investigation and improper and unlawfully issued search warrant, the Plaintiff was cause to be immediately arrested by the Defendants, Schumaker, Marcum, Menda, Kerr and Evans ("3CD") who are the same as the 1CD and 2CD, on September 8, 1988, and indicted on fourteen (14) counts on September 19, 1988. The arrest warrant of September 19, 1988 is attached as Exhibit "9" and incorporated herein as if fully rewritten. The indictment is attached hereto as Exhibit "10" and incorporated herein as if fully rewritten and sets forth the fourteen (14) counts.

52. The aforesaid indictment was issued unlawfully, untruthfully, with reckless indifference to law and procedure, and with actual malice, alleging that the Plaintiff had been guilty of the various State crimes. The presentation to the grand jury constituted prosecutorial misconduct. No reasonable law enforcement officer would have arrested the Plaintiff, or even obtained a search warrant based upon the information available and investigation done

as of September 7, 1988. Further, any reasonable officer would have known he was violating the clearly established constitutional and statutory rights of the Plaintiff as set forth in paragraph twelve (12), supra.

53. Prior to September 7, 1988 and thereafter, the 3CD continued to investigate the aforesaid Plaintiff and his acts, conduct, and whereabouts during the alleged crimes. The 3CD had available to them information that he was not even in the State on some of the alleged dates but totally ignored same. The 3CD either refused to consider said information and/or refused to obtain corroboration of same. Said 3CD were totally indifferent to said information and the statutory and constitutional rights of the Plaintiff.

54. The unlawful conduct of these 3CD therefore proximately resulted in the unlawful arrest and detention of the Plaintiff.

55. The aforesaid 3CD between the date of the arrest and the indictment further failed to investigate the Plaintiff's whereabouts, alibis, and other physical information which proved his innocence. Said acts and omissions were known to , and totally ignored by these 3CD even though it was reported to them on September 8 and 9, 1988 and it was their official duty, pursuant to State law, to investigate the prosecution of Plaintiff's case, after the arrest as well as before. The presentation of exculpatory evidence is as much a duty of law to 3CD as is the prevention of seemingly incriminating evidence.

56. Defendant, Schumaker intentionally and with reckless disregard of the law, including the aforementioned constitutional and statutory rights of Plaintiff, administered his office so as to ignore and obstruct the release of exculpatory evidence which he had a duty to consider and release and further investigate or cause to be investigated. The failure to do so is in violation of clearly established state standards for prosecutors, including Canons of Ethics, Disciplinary Rules, Model Acts, and those established as standards within the profession by practice, usage, custom and case law.

57. In failing to make known and/or available these facts, the aforesaid 3CD unlawfully facilitated the continued incarceration of Plaintiff in violation of his constitutional and statutory rights. Defendant ratified the unlawful acts of the other 3CD.

58. The acts and omissions of the 3CD, individually, collectively, and in concert was in furtherance of the custom and unwritten policy as is set forth in paragraph six (6) (incorporated herein as if fully rewritten) so as to receive the endorsement, approval, support and ratification of the Defendant City of Springfield and Defendant Clark County, as averred hereinafter in the Fourth Cause of Action.

59. The aforesaid conduct of 3CD violated the statutory and constitutional rights of the Plaintiff, as averred in paragraph twelve (12), and under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and was a violation of 42 U.S.C. 1983, et seq., and 42 U.S.C. 1985 (because of his

classification as an indigent and unequal treatment afforded thereunder).

60. As a proximate result of the wrongful conduct of 3CD, the Plaintiff proximately suffered economic, psychological, physical related injuries for which he is entitled to recover compensatory, punitive and other damages, including attorney fees, costs, and interest.

FOURTH CAUSE OF ACTION

61. Plaintiff incorporates paragraphs one (1) through sixty (60) as if fully rewritten herein.

62. The Plaintiff seeks redress for his claims in this Count under 42 U.S.C. 1983 et seq for violations of his clearly established constitutional and statutory rights.

63. The Defendants, Evans, Marcum, Menda, Kerr and Schumaker ("4CD") subjected the Plaintiff to unlawful and improper police line-ups, and had him improperly identified as a potential suspect thereby amassing additional untruthful evidence without probable cause, in a reckless disregard of their duties and without regard to reasonable inquiry by any objective, reasonable, independent law enforcement officer, or prosecutor, as required by the duties of the respective office. Unlawful aspects included:

A) Arranging for a line-up immediately upon Plaintiff's arrest, thereby denying him effective assistance of counsel or assuring him fairness before the

wrongful conduct could be remedied. (Violation of the Sixth Amendment).

B) Knowing that no one victim could reliably identify their attacker or with reckless disregard thereof and that they could not identify the person who attacked them, placed all the victims together in a room continuously for one (1) to two (2) hours prior to the line-up.

C) Subjected several of the more suggestible victims to a tainted photo array prior to the line-up.

D) Allowed all the victims to view photographs, one of which was Plaintiff, but no photograph of anyone else who would appear in the actual line-up, live. Thereby, all had already seen the Plaintiff, and only the Plaintiff, when they viewed the live line-up that, of course, included the Plaintiff.

E) Refused to allow the victims to review their previous descriptions of their assailant or statements made at the time.

F) Created great pressure upon the victims to identify Plaintiff, or someone.

G) Improperly suggested to the victims that the rapist was among those in the line-up.

H) Otherwise constructed the line-up so that Plaintiff would be the most likely one picked, almost without any reasonable question.

64. These 4CD knew that their conduct was in violation of the Plaintiff's statutory and constitutional rights to a fair procedure for the line-up under the requirements for due process, equal protection and effective right to counsel (IV, V, VI, and XIV Amendments).

65. Said wrongful conduct was assured to cause the continued wrongful incarceration and detention of the Plaintiff, all proximately resulting in his injuries and ensuing damages.

66. As a proximate result of the wrongful conduct of the 4CD, the Plaintiff proximately suffered economic, psychological, physical and related injuries for which he is entitled to recover compensatory, punitive and other damages, including attorney fees, costs and interest.

FIFTH CAUSE OF ACTION

67. Plaintiff incorporates paragraphs one (1) through sixty six (66) as if fully rewritten herein.

68. The Plaintiff seeks redress for his claims in this Count under 42 U.S.C. 1983, et seq. for violations of his clearly established constitutional and statutory rights.

69. Defendants Marcum, Menda, Kerr, Evans and Schumaker ("5CD"), individually, collectively

and in concert, concealed and failed to reveal exculpatory evidence to the Court, the Plaintiff, or Plaintiff's counsel upon arraignment, and 5CD continued to conceal and obstruct the release and/or gathering of said evidence as is set forth heretofore.

70. Defendant further assisted in this concealment and misrepresentation by knowingly administering his office in a manner which obstructed obtaining and/or the release of said exculpatory evidence both to the courts and Plaintiff, as well as providing improper supervision to other 5CD which was not a part of the judicial base of his office.

71. The unreasonable bond was a violation of the Plaintiff's constitutional rights pursuant to the Fourth, Fifth, Eighth and Fourteenth Amendments and, under O.R.C. 2937.22 and O.R.Cr.P. 46.

73. 5CD sought, by said high bond, to break Plaintiff's will and faith in the vindication of his innocence so that he would plea bargain to some of the charges, though 5CD knew, or should have known, Plaintiff was innocent as Plaintiff maintained his innocence throughout.

74. 5CD acted totally unreasonably in obtaining said bond, especially due to his immunity and reason to know that their conduct was unlawful or they should have known no reasonable officer would have so acted.

75. As a proximate result of the wrongful conduct of the 5CD, the Plaintiff proximately suffered economic, psychological, physical and related injuries for which he is entitled to recover compensatory, punitive and other damages, including attorney fees, costs and interest.

SIXTH CAUSE OF ACTION

76. Plaintiff incorporates paragraphs one (1) through seventy five (75) as if fully rewritten herein.

77. This cause of action is brought pursuant to 42 U.S.C. 1983, et seq for violations of Plaintiff's clearly established constitutional and statutory rights.

78. The Defendant, Stephen Schumaker, in the administration of his office, caused great publicity to be made of Plaintiff's arrest and used such publicity in his political campaign to obtain re-election. He did so with actual malice, outside the scope of his office and in violation of the Professional Code of Responsibility at 7-103 and 7-107, as well as clearly established rules of conduct within his profession, as previously identified.

79. The conduct of the Defendant was intentional in that he discussed publicly the purported guilt of the Plaintiff for purposes both of his office and outside of his office (political) but not in furtherance of and [sic] recognized exception to the clearly established prohibition against a prosecutor talking about a case which is awaiting trial.

80. The aforesaid conduct of Defendant Schumaker was in violation of Plaintiff's clearly established constitutional and lawful rights, established by case law, disciplinary rule, canons of ethics, code of responsibility, custom use and practice in the State of Ohio for a fair trial and, right to due process under the Fifth and Fourteenth Amendments, the duty of a prosecutor to the accused and public under DR 7-103 and 7-107, as well as 42 U.S.C. 1983.

81. As a proximate result of the wrongful conduct of the Defendant, the Plaintiff proximately suffered economic, psychological, physical and related injuries for which he is entitled to recover compensatory, punitive and other damages, including attorney fees, costs and interest.

SEVENTH CAUSE OF ACTION

82. Plaintiff incorporates paragraphs one (1) through eighty one (81) as if fully rewritten herein.

83. Plaintiff brings this cause of action pursuant to 42 U.S.C. 1983, et seq for violations of his clearly established constitutional and statutory rights.

84. The Defendants Schumaker, Menda, Kerr, Evans and Marcum ("7CD.") further attempted to obtain improper admissions and statements from the Plaintiff and attempted to get him to plead guilty to lesser crimes, or a fewer number of crimes, under a plea bargaining arrangement representing that they would, in fact, see that he would not get treated as harshly if he would do so, all the

time knowingly concealing or ignoring the facts set forth heretofore that proved his innocence.

85. All of the aforesaid investigation was biased and designed not to prove the facts of the case, nor to follow any leads that were favorable to the Plaintiff, or to show his innocence, but, instead, to assure a successful criminal prosecution of the Plaintiff who, in fact, was innocent of any and all charges.

86. Such conduct by the aforesaid 7CD was done knowingly, with actual malice, without probable cause, and in violation of the Plaintiff's statutory and constitutional rights to be free from such conduct.

87. The 7CD knew, or should have known, that they were unable to conduct a fair and impartial investigation of the Plaintiff after they prejudiced the investigation by their myopic targeting of the Plaintiff, the comments and publicity surrounding same as provided to news media by the aforesaid 7CD, and in particular, Defendant, and other prejudice exhibited toward the Plaintiff. 7CD failed to correct their conduct toward the Plaintiff or to, in fact, cease and desist their unlawful conduct even when placed upon notice that there existed sufficient evidence to exculpate Plaintiff.

88. The actual incarceration of Plaintiff continued until January 4, 1989. Attached hereto as Exhibit "11" is a copy of a Request for Discovery made by Defendant Stephen A. Schumaker on January 3, 1989. This request is attached hereto and incorporated herein as if fully

rewritten. It was not until January 10, 1989 that a nolle prosequi without prejudice was filed by Defendant.

89. The aforesaid Request for Discovery was made after the prosecutor, Defendant Stephen A. Schumaker, and the other 7CD, knew as a matter of fact that the Plaintiff could not possibly have committed the crime because of the pre-screening test done by the regional crime laboratory, other physical evidence and the DNA testing done. Of even greater significance was the fact known to these 7CD that a rape had taken place on 12/31/88 of Ms. Judith Lynne Kent in Allen County with the exact same modus operandi in the rapes for which Plaintiff was charged, including those characteristics set forth in Exhibit 6. 7CD knew that Plaintiff could not have committed said rape, as he was incarcerated, but ignored same.

90. Becky Garrity an employee of the Clark County Sheriff's Department was told that the DNA results were obtained prior to January 4, 1989. Further, Plaintiff avers he was told directly and indirectly by one or more of the 7CD that the DNA test results would be received much sooner than January 4, 1989.

91. If, indeed, the DNA testing procedures took this long, the aforesaid 7CD had a duty to release the Plaintiff on reasonable bond, require an expeditious testing, or at least review the other exculpatory physical evidence collected by the regional crime lab, all of which exculpated Plaintiff. Attached hereto as Exhibit 13 is a requested DNA test on July 21, 1989 and return report of August 22, 1989. This is some thirty (30) days, not over one hundred (100) days as in the case at bar. The delay at bar is beyond a reasonable time.

92. At all times material hereto the 7CD knew, or should have known by the foregoing, that the allegations made against the Plaintiff were false and any reasonable person in the 7CD's position would have known that the Plaintiff's clearly established constitutional and statutory rights were being violated.

93. In the alternative, at some time during the investigation it became undeniably clear that the Plaintiff was not guilty of the crimes or that very conclusive exculpatory evidence existed, and he still was forced to undergo criminal prosecution and remained incarcerated without probable cause and maliciously detained against his constitutional rights under the Fourth, Fifth, Eighth and Fourteenth Amendments.

94. As a direct and proximate result of the unlawful conduct of the aforesaid 7CD, as aforesaid, jointly and severally, the Plaintiff suffered a loss of freedom, malicious criminal prosecution, false arrest, false imprisonment, denial of his constitutional rights to be safe and secure in his person and property, denial of his due process right, denial of his fundamental rights at critical stages of he investigatory and accusatory process, loss of his reputation, defamation to his character, damage to his quality of life, emotional and psychiatric injuries, physical injuries, job loss, wage loss, economic loss, job endangerment, permanent loss of future economic opportunities and employment with a permanent diminishment in earning capacity, and other related damages which are permanent.

95. The aforesaid acts, conduct, omissions and behavior of the aforesaid O.R. were performed knowingly, wantonly, intentionally, willfully,

recklessly, grossly negligently, totally indifferently, and/or maliciously, by reason of which Plaintiff is entitled to an additional award of punitive damages.

EIGHT CAUSE OF ACTION

96. Plaintiff incorporates paragraphs one (1) through ninety five (95) as if fully rewritten herein.

97. This cause of action is brought pursuant to 42 U.S.C. 1983 and 42 U.S.C. 1985, et seq for violations of Plaintiff's clearly established constitutional and statutory rights.

98. With knowledge and/or reckless disregard for the truth, Defendants, Schumaker, Evans, Marcum, Menda and Kerr, ("8CD") individually, collectively and in concert, and in furtherance of the aforesaid policy, or lack of policy , or the Defendant City of Springfield, as set forth in the First, Second and Third Causes of Action, caused the Plaintiff's arrest and indictment, and thereby his unlawful incarceration by intentionally and/or with reckless disregard, violating the Plaintiff's aforementioned clearly established constitutional and statutory rights while Plaintiff was indigent and unable to help himself. The aforesaid 8CD set in motion a chain of events which foreseeably and proximately resulted in all damages to the Plaintiff as averred herein. The failure of the City of Springfield to implement policies or carry out existing policies, the exact nature of which is unknown to the Plaintiff without further discovery, to comply with the clearly established statutory and constitutional rights of the Plaintiff is set forth in paragraph twelve (12).

99. The Defendant City of Springfield is further liable for the unlawful arrest under the doctrine of respondeat superior and the state law as plead hereinafter.

100. The arrest and detention was without probable cause and proximately resulted in pecuniary, emotional and physical damages as set forth hereinafter.

NINTH CAUSE OF ACTION

101. Plaintiff incorporates paragraphs one (1) through one hundred (100) as if fully rewritten herein.

102. This cause of action is brought against the City of Springfield pursuant to 42 U.S.C. 1983, et seq for violations of Plaintiff's clearly established constitutional and statutory rights. It is also brought pursuant to 42 U.S.C. 1985, as the Defendants had a duty toward a group of indigent people, of which Plaintiff was a class member, to develop effective policies and procedures to prevent the denial of his clearly established constitutional and statutory rights.

103. The aforementioned actions in Counts I, II, and III in violation of Plaintiff's statutory and constitutional rights by Defendants Marcum, Menda, Kerr and Evans were pursuant to written policy, practice, custom and/or unwritten policy of the Defendant City of Springfield, Ohio whereby probable cause was lacking for some persons considered significant suspects, affidavits were prepared with known omission of facts and material misstatements and misrepresentations so as to procure warrants and affect arrests in the hope of obtaining incriminating evidence.

accused in the rape investigations for which the Plaintiff was charged. There was inherent, unequal treatment, invidious, capricious and unequal treatment toward the Plaintiff. Upon information and belief, it is averred that these unlawful practices permeated the operation of the functions of the Defendants toward all accused, and in particular the indigent and impecunious.

104. As a result of these unlawful practices by individual Defendants, and by the conduct in concert, involving at least tow of the Defendants together in a conspiracy, the search warrant in this case was issued in violation of the Plaintiff's constitutional and statutory rights under the Fourth, Fifth and Fourteenth Amendments, as well as contrary to the statutory law, policies, customs and procedures as set forth in the foregoing paragraphs, which are reincorporated herein.

TENTH CAUSE OF ACTION

105. Plaintiffs incorporate paragraphs one (1) through one hundred four (104) as if fully rewritten herein.

106. This cause of action is brought under 42 U.S.C. 1983, et seq for violations of Plaintiff's clearly established constitutional and statutory rights.

107. On or about September 7, 1988 the Plaintiff had suffered an injury to his hand and was trying to recover from what was a very serious, obvious, and apparent condition that clearly required medical attention from a professional health care provider.

108. All of the Defendants (, Menda, Kerr, Marcum, Evans, Sheriff Kelly and the County, [through its employees] and the City [through its employees]) (hereafter "10CD") knew of this medical condition. See attached Exhibit "14" which is a medical receiving form for Plaintiff, upon his initial incarceration. All the aforesaid 10CD knew it was reasonably foreseeable that should the Plaintiff be incarcerated and not provided adequate medical treatment within the accepted standard of care, he would suffer further serious and permanent injury, aggravation and acceleration of a pre-existing injury, all in violation of the Plaintiff's constitutional and statutory rights. Further, all of the aforesaid 10CD knew that such failure to provide adequate care would proximately result in permanent disability, great pain, suffering, loss of wages, diminishment of earning capacity and other economic damages as well as other damages.

109. Defendants Clark County and Sheriff Kelly are statutorily and constitutionally required to maintain minimum jail standards, including the proper administration of medical services. The requirements are set forth in R.C. 5120.10, R.C. 341.07, Amendment VIII of the United States Constitution and Ohio Admin. Rules 5120:1-7-01, a copy of which is attached hereto as Ex.2 and incorporated herein as if fully rewritten. The jail had established written policies and procedures in order to enact the standard of care.

110. Specifically, the aforesaid administrative rules and written procedures require the Defendants Sheriff Kelly and Clark County to examine, evaluate, administer treatment, administer medication and otherwise care for the Plaintiff within the standard of care

prescribed by law. Pertinent sections include but are not limited to:

> 5120:1--8-01(F): A preliminary health evaluation record shall be completed on all prisoners upon admission and prior to being placed in the general population to determine if the prisoner is experiencing any serious physical or mental disorder; and, in the event such a condition appears to exist, treatment will be provided prior to confinement in accordance with the medical and health care plan in paragraphs (B) and (C) of rule 5120:1-08-09 of the administrative code.
>
> 5120:1-8-03(L): A written entry (e.g. on a jail log) shall be made of all significant activities occurring within the confinement facility to include but not be limited to:
>
> (7) medical treatment
>
> 5120:1-8-03(AA): Restraining devices shall only be employed during transportation or pending the approval of the jail administrator or his designee for the following:
>
> (1) to prevent the prisoner from harming himself;
>
> (2) protection of another person from a prisoner attack; and

(3) self defense of staff.

5120:1-8-09(C): A medical staff member or receiving officer shall complete a preliminary health evaluation record for all new admissions including but not limited to :

(1) Current illnesses and health problems...

(2) Medications taken and special health requirements.

(3) Screening of other health problems designated by the responsible physician.

(9) Notation of personal physician and any medical needs.

5120:1-08-09(H): Each jail shall provide a daily procedure whereby each prisoner may have an equal opportunity to report medical complaints tot he facility physician, either directly or through is designee(s).

(1) All medical complaints shall be recorded and maintained on file.

(2) All medical complaints shall be review daily by allied medical personnel in conjunction with the

facility physician, an treatment provided as deemed appropriate.

5120:1-8-09(L): the administration of prisoner medications and medical supplies shall be regulated by the written medical and health care plan.

5120:1-8-09(M): Medications shall only be administered in the dosage, form and at the time prescribed by the physician treating the prisoner.

5120:1-8-09(P): No prisoner shall be denied medical attention for disciplinary reasons or on the basis of his classification status.

5120:1-8-12(C)(3): Fundamental rights which cannot be suspended:

(e) medical care

5120:1-8-17(B): The official charged with responsibility for operating a jail shall function as a jail manager or shall designate a jail manager who is qualified by training and/or experience to supervise and control prisoners.

5120:1-8-19(A): Jail employees shall not:

(5) Discriminate against any prisoner on the basis of race, religion, creed, gender, national origin, or other individual characteristics.

(7) Subject prisoners to any form of unwarranted physical or mental abuse.

(8) Intentionally demean or humiliate prisoners. Further, paragraphs of the introduction are realigned as if fully rewritten herein, which incorporate the written policies and procedures as Ex. 2.

111. As part of the requirements for the maintenance of the Clark County jail, Sheriff Kelly must hire, and the County must pay for, a medical doctor and adequate medical staff. The hiring of said doctor and staff does not abrogate the duties of Defendant County and Sheriff to the Plaintiff to provide adequate medical evaluation, care and treatment. These duties are non-delegable.

112. At the time of Plaintiff's incarceration until his release, Defendant Walter Lawrence was the licensed physician hired and charged with the care of Plaintiff. Dr. Lawrence also had supervisory authority over employees of the jail. Thus, the dual agency of all 10CD and applicability of respondeat superior.

113. While the Plaintiff was incarcerated, he requested medical treatment in the form of follow-up therapy and treatment for his hand as prescribed by his treating physician, Dr. Barre and the Miami Valley Hospital Physical Therapy Department. Physical Therapy had been given on a regular basis prior to incarceration and was needed to be continued in order to recover hand movement to as great an extent as possible.

114. The Plaintiff also was in need of immediate further surgeries to his ankle, leg and hand in order to transplant tissues from his lower extremity to his hand. Time was of the essence for these procedures. Further, all procedures required hospitalization, therapy and intensive medical care, which the Defendant Clark County, Sheriff Kelly and Dr. Lawrence had to provide, or if they could not, he was to be hospitalized.

115. The Defendants City of Springfield, Evans, Marcum, Menda, Kerr, and, knew of this medical condition and the failure to treat by all the other 10CD (Dr. Lawrence, Sheriff and County) was reasonably foreseeable. The resulting additional aggravation and further permanent injuries, as the proximate result of the acts and omissions of defendants Springfield, Evans, Marcum, Menda, Kerr, and, independently and jointly with all other acts and omissions by the said Kelly, Lawrence and Clark County. The joint and several tortfeasor and successive tortfeasor rules of law are applicable hereto.

116. Upon incarcerating the Plaintiff in the Clark County Jail, the Clark County Sheriff, Gene A. Kelly, Dr. Walter Lawrence, and Clark County, Ohio had a duty to

render to him adequate medical care pursuant to state law, the constitutional and the standard of care established by custom, usage, practice and case law.

117. The Plaintiff required constant, timely, and adequate medical evaluation, care, surgery, physical therapy, exercise, medication, and other treatment for his hand, leg, and ankle, as known by all the Defendants in t his case. It was foreseeable the failure to provide any of these modalities would have resulted in injury and damages to Plaintiff.

118. Throughout the incarceration, Dr. Barre made known the treatment and follow-up care needed directly to the Defendant, Dr. Lawrence, and Sheriff Kelly, by and through the jail employees, who were agents of both the Sheriff and Dr. Lawrence and Sheriff Kelly, as well as the County. So did the Plaintiff, himself.

119. Even though the aforesaid 10CD knew, or had a duty to always know, of the medical condition of the Plaintiff upon incarceration, the surgeries subsequent thereto, and the appropriate care an treatment of the Plaintiff, they intentionally, wantonly, and recklessly ignored same which proximately resulted in the loss of function of the Plaintiff's hand, leg, ankle and whole body, causing permanent disabilities, pain suffering, and mental anguish, which is also permanent in nature. These conditions are permanent, resulting in great economic damages.

120. Upon being informed of the need for follow-up therapy, the Defendant, Dr. Lawrence, advised the Plaintiff hat he would get excellent medical care when he got to prison and not to expect him, or any of the Sheriff's employees, to take Plaintiff to Miami Valley Hospital from the Clark County Jail in order to receive treatment. This was stated to the Plaintiff by the Defendant, Dr. Walter Lawrence, who was acting in the course of and arising out of his employment with Clark County and Sheriff Kelly. he, further, was acting independently and under his duty and profession as a physician licensed to practice in t he State of Ohio. It was also stated in the presence of jail employees, who took no independent action to provide the required care.

121. The Defendant, Walter Lawrence, failed to exercise any reasonable degree of care required of a physician of his attainment and failed to provide adequate medical advice, care, and treatment to the Plaintiff and, as a result thereof, the Plaintiff has suffered permanent and grievous injuries as aforesaid with accompanying economic and non-economic damages.

122. The aforesaid conduct of the Defendant, Dr. Walter Lawrence, under color of State law and while under authority and direction of the Defendant, Clark County, through the Clark County Board of County Commissioners and Sheriff Kelly who had authority and supervisory capacity over said doctor, proximately resulted in the aforesaid injuries. Further, other employees of the Sheriff are liable for the failure to provide adequate medical care and treatment to the Plaintiff or report same.

123. After the Plaintiff had been incarcerated for seven (7) weeks, his condition became so bad that Defendants Kelly and Lawrence did, in fact, cause Plaintiff to be transported to Miami Valley Hospital where he received medical care which was too little and too late. The subsequent surgeries to the hand failed. this required surgery to the ankle for transplant purposes. Further, the subsequent surgeries to his left ankle and leg failed because of his inability to exercise in his holding cell and the lack of overall follow-up care by the Defendant Lawrence, Sheriff Kelly, Sheriff's employees and Clark County. He was also held and transported in manners which violated the policies and procedures for the jail, attached hereto as Ex.1 and Ex.2.

124. The aforesaid conduct was pursuant to a custom and unwritten policy of the Defendant Clark County whereby persons who were arbitrarily pre-determined as likely to be transferred to State prison facilities were withheld or denied medical treatments as long as possible. The motive was to pass the cost on to the State so that such costs would not be absorbed by the County. Further, less effort was required of the aforesaid Defendants (Kelly, [individually and through his employees], Dr. Lawrence, and the County [through its employees]).

125. The Defendants Sheriff Kelly, Clark County and Dr. Lawrence and the employees of the Sheriff and County had failed to promulgate sufficient written rules and procedures, as required in the Administrative Regulations, as attached. These Defendants had not even conducted their duties toward Plaintiff in conformity with those policies and procedures promulgated thereunder, and

as attached. Said written policies and procedures required the approval of the County and compliance by Lawrence.

126. The aforesaid conduct constituted cruel and unusual punishment and a deprivation of the rights of the Plaintiff pursuant to the Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983, as well as the aforesaid statutes, Administrative Regulations, policies and procedures.

127. As a proximate result of the aforesaid unlawful conduct, failure to provide medical treatment, malpractice, cruel and unusual punishment, failure to provide adequate care at a detention facility, the Plaintiff suffered severe damages in the form of lost wages, future lost wages, diminishment of earning capacity, permanent disability, permanent pain, suffering and scarring, and said conditions will continue into the future.

128. The Plaintiff is entitled to relief for his economic, psychological and physical constitutional violations and 42 U.S.C. 1983, et seq. in the form of compensatory, punitive and related damages, including attorney fees, costs and interest because of the failure of Clark County, the Clark County Sheriff, Dr. Walter Lawrence, and all other Defendants, as aforesaid, who placed the Plaintiff into the jail. Further, all 10CD knew or were completely reckless and indifferent to the fact they were violating the Plaintiff's clearly defined statutory and constitutional rights while acting under color of State law.

ELEVENTH CAUSE OF ACTION

129. Plaintiff incorporates paragraphs one (1) through one hundred and twenty eight (128) as if fully rewritten herein.

130. This cause of action is brought under state law and the common law causes of action for medical negligence, commonly called "malpractice".

131. The Defendants, Walter Lawrence, individually and as an employee of Clark County and the Sheriff, the Clark County Sheriff and Clark County, ("11CD") are sued jointly and severally pursuant to the causes of action for medial malpractice as provided in R.C. 2305.11 and 2307.42. these 11 CD failed to provide adequate medical facilities and care to the Plaintiff, within the accepted standard of care for such like and similarly situated physicians and facilities.

132. The care, treatment and follow-up provided to the Plaintiff was below the standard of care for not only a physician, but also, a jail facility providing medical care, which care was required within the written Administrative Rules, policies and procedures, to be that similar to any citizen of Clark County.

133. As to Dr. Lawrence, an affidavit in conformity with R.C. 2307.42 is submitted herewith (Ex.15). This affidavit also complies with the requirements for suing a health care facility, such as a jail.

134. Sheriff Kelly and Clark County failed to properly supervise and control Dr. Lawrence, the jail personnel and the jail facility. the Defendant Sheriff Kelly and Clark County were also liable for Dr. Lawrence's conduct under the doctrine of respondeat superior and/or non-delegable duty and/or dual agency.

135. All the other Defendants in the case are jointly and severally liable for he resulting malpractice experienced by Plaintiff as their unlawful acts placed him into the situation where it was foreseeable that the malpractice would occur. The conduct of all the Defendants was reckless, wanton, and willful, as well as negligent.

136. The conduct of all the Defendants, jointly and severally, as aforesaid, proximately cause the injuries to Plaintiff. Said injuries are permanent in nature, are economical, psychological and physical, mandating appropriate compensatory and punitive damages, together with other appropriate damages.

TWELFTH CAUSE OF ACTION

137 Plaintiff incorporates paragraphs one (1) through one hundred and thirty-six as if fully rewritten herein.

138. This cause of action is under the state law and pendant jurisdiction.

139. The Defendants Schumaker, Marcum, Menda and Kerr, ("12D") jointly and severally issued written and

verbal statements to others asserting that the Plaintiff was guilty of the many crimes for which he was indicted and that he was indeed, and infamous rapist, subject to continued criminal prosecution and incarceration.

140. The 12CD maliciously published, or knew, these defamatory statements would be published or republished to third persons including, but not limited to, the general public and other parties who specifically knew Plaintiff..

141. As a result of the aforesaid malicious publications, virtually every person in the jurisdictional area of the Court became aware, through radio, newspapers, television and personal statements that the Plaintiff was accused of being a rapist and a criminal. There was no doubt that these references were made toward the Plaintiff and that these statements, written, and oral, were untrue.

142. All the aforesaid material was false, or should have been know to be false, and was made maliciously. Upon reasonable inquiry there would have been no reason to have made the aforesaid publications.

143. The aforesaid publications were libelous and slanderous per se and the Plaintiff is entitled to compensatory damages of harm to his employment, damages to his future employment, damages to his relationships with others, damages to his general reputation and home life.

112. As a direct and proximate result of the aforesaid false and malicious statements published by the

Defendants, the Plaintiff is also entitled to punitive damages and other appropriate damages

THIRTEENTH CAUSE OF ACTION

145. Plaintiff incorporated paragraphs one (1) through one hundred and forty four (144) as if fully rewritten herein.

146. This cause of action is brought under state law and the pendent jurisdiction of this court.

147. The Defendants Marcum, Kerr, Shumaker and Evan, maliciously, wrongfully, under color of law, and without probable cause, caused the indictment to be issued against the Plaintiff and caused said prosecution to continue against the Plaintiff for the crimes as alleged therein.

148. There was, indeed, a malicious filing of an indictment.

149. There was a lack of probable cause for filing that indictment.

150. The prosecution has been terminated in favor of the Plaintiff pursuant to the attacked Exhibit "12" which is an Entry whereby on January 10, 1989, the indictment was dismissed against the Plaintiff.

151. The result was in Plaintiff's favor.

152. The unlawful acts of Defendants Marcum, Menda, Kerr, and Evans caused an actual seizure of the

Plaintiff's person during the course of the prosecution. The conduct of these Defendants was within the scope of their employment with the City of Springfield, making said City also liable.

153. The unlawful conduct, as aforesaid, constituted an abuse of process.

154. All of the aforesaid acts and conduct resulted injuries to the Plaintiff for which he is entitled to relief in the form of compensatory, punitive and related damages.

FOURTEENTH CAUSE OF ACTION

155. Plaintiff incorporates paragraphs one (1) through one hundred and fifty four (154) as if fully rewritten herein.

156. This cause of action is brought under state law and the pendent jurisdiction of this court.

157. False arrest and imprisonment resulted from the aforesaid conduct of the aforesaid Defendants named in the Thirteenth cause of action by which the Plaintiff was deprived of his physical liberty.

158. The arrest was unlawful and made without probable cause by a person who was authorized to make the arrest but had reason to believe, or upon reasonable inquiry would have had reason to believe, that the Plaintiff was not guilty of the crimes for which he was arrested.

159. The arrest was effected under color of law and thereafter the Plaintiff was forced to be incarcerated until January 4, 1989 and subject to prosecution until January 10, 1989, with the further threat of prosecution as a result of the unjustifiable dismissal without prejudice by Defendant Schumaker, also is jointly and severally liable with Marcum, Menda, Kerr and Evans.

160. Further, the Plaintiff was caused to be unlawfully falsely imprisoned by his incarceration and, indeed, was continued to be falsely imprisoned as a result of the wrongful conduct of the Defendants Marcum, Menda, Kerr, Schumaker and Evans, even after they became aware that he was innocent, or after any reasonable person would have become aware of his innocence.

161. As a result of the unlawful conduct of the Defendants, Marcum, Menda, Kerr, Schumaker and Evans as aforesaid, the Plaintiff proximately suffered damages for which relief is provided under State law in the form of compensatory and punitive damages and for which relief may be granted hereunder, pursuant to the pendent jurisdiction of the Court.

FIFTEENTH CAUSE OF ACTION

162. Plaintiff incorporates paragraphs one (1) through one hundred and sixty one (161) as if fully rewritten herein.

163. This cause of action is brought under state law and the pendent jurisdiction of this court.

164. The indictments were returned without any type of reliable investigation and were returned based upon conduct of the Defendants Marcum, Menda, Kerr, Schumaker and Evans ("15CD") which fell well below the usual, customary standards of their office, and indeed, in contravention thereof, or of any similarly situated office holders in the jurisdiction.

165. The investigation, issuance of the search warrant, line-up, arrest and issuance of said indictment were not only done maliciously and without probable cause but, were abuses of the criminal process and in direct contravention to the rights of the Plaintiff pursuant to the law and Constitution of the State of Ohio and United States of America.

166. Thereunder, under this investigation, the aforesaid 15CD did jointly and severally, under color of their office and, at times outside the color of their office, as more fully set forth heretofore, unlawfully engaged in the following inappropriate activities:

A) Fail to obtain a warrant upon probable cause.

B) Improperly used a photographic display.

C) Improperly conducted police line-ups.

D) Improperly took statements from the Plaintiff and witnesses.

E) Failed to follow-up alibis, defenses, and other available information that showed the innocence of the Plaintiff

F) Failed to review any and all evidence of exculpation and mitigation including, but not limited to the physical evidence, DNA reports, inter-departmental sources and FBI-NCIC arrest reports in a timely and appropriate manner.

G) The Defendant, Stephen Schumaker, inappropriately, maliciously, and without probable cause, used the unfortunate circumstances of the Plaintiff improperly to his benefit for political purposes and in violation of his professional responsibility, both privately and politically.

H) Obtained an unreasonable bond and failed to lower it when information was available which any reasonable public officer would have so required the reduction of the bond or release of the Plaintiff.

167) The aforesaid conduct proximately resulted in the aforesaid injuries to Plaintiff for which he is entitled to compensatory and punitive damages, for the economic, psychological and physical injuries of the Plaintiff.

SIXTEENTH CAUSE OF ACTION

168. Plaintiff incorporates paragraphs one (1) through one hundred and sixty seven (167) as if fully rewritten herein.

169. All of the Defendants in the case at bar, jointly and severally, engaged in reckless, negligent, grossly negligent, wanton, willful, malicious, and/or intentional conduct, denying the Plaintiff a lawful investigation, causing an unfair deprivation of his constitutional and statutory right to due process of law, causing him to be unlawfully incarcerated and suffer cruel and unusual punishment by the incarceration and failure to provide adequate medical care to Plaintiff.

170. As a proximate result of the aforesaid, the Plaintiff was subjected to false arrest, false imprisonment, abuse of process, malicious prosecution, malpractice, deprivation of civil rights, an denial of constitutional and statutory rights, as aforesaid.

171. The Defendants intentionally or recklessly acted in an extreme and outrageous manner, proximately causing the Plaintiff's psychological, physical, and economic related injures. The Plaintiff's mental anguish was, and is , serious and of a nature that no reasonable man could be expected to endure.

172. As direct and proximate result of all said Defendants' conduct as aforesaid, the Plaintiff has suffered sever emotional distress.

173. Said sever emotional distress is permanent in nature and is of the kind that no reasonable person could be expected to endure without injury and entitles Plaintiff to both compensatory and punitive damages (as well as all other appropriate damages.

SEVENTEENTH CAUSE OF ACTION

174. Plaintiff incorporates paragraphs one (1) through one hundred and seventy three (173) as if fully rewritten herein.

175. The activities of all of the Defendants was in consultation with each other and they acted in concert with each other and were mutually aware of information available which indicated that Plaintiff was being inappropriately incarcerated, prosecuted, unlawfully denied medical treatment, and subjected to the aforesaid other illegal acts as is set forth heretofore.

176. All the Defendants acted in concert with the other and with knowledge of what the other knew or should have known all information was available to each other. As such, these actions constituted a state civil conspiracy, as well as a conspiracy to deprive the Plaintiff of his rights under the Ohio and United States Constitutions, State law, and 42 U.S.C. 1983 et seq (including 42 U.S.C. 1985). The right to recover under state law for a civil conspiracy is separate from all other cause of action.

177. The conduct of all the Defendants named in the suit at bar also constituted violations of R.C. 2921.44 and R.C. 2921.45, dereliction of duty and interfering with Civil Rights.

178. The aforesaid violations of criminal statutes, as well as the violations of those statutes set forth in paragraph twelve (12) are separately actionable by Plaintiff under R.C. 2307.60, for compensatory, punitive and related

damages, including costs, attorney fees and interest for the economic, psychological and physical injuries, as well as other injuries prayed herein. The causes of action under R.C. 2307.60 and civil conspiracy, while separate, are herein plead together as proof of one (2307.60) in support of the other.

EIGHTEENTH CAUSE OF ACTION

179. Plaintiff incorporates paragraphs one (1) through one hundred and seventy eight as if fully rewritten herein.

180. This cause of action is brought under State law and is against all the Defendants, jointly and severally.

181. The aforesaid conduct of all of the Defendants, jointly and severally, constituted a wrongful intrusion and interference into the Plaintiff's personal life and activities in such a manner as to outrage him and cause mental suffering, shame, and humiliation to a person of ordinary sensibilities.

182. The conduct of the Defendants was malicious.

183. The conduct of Defendants, jointly and severally, gave publicity toward the Plaintiff in a matter and manner which placed the Plaintiff in a false light. In so doing, the Defendants, jointly and severally:

1) Placed the Plaintiff in a false light which was highly offensive to a reasonable person.

2) The Defendants had knowledge of, or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the Plaintiff was placed.

3) The conduct of the Defendants, jointly and severally, and in particular Defendant Schumaker, represented an unwarranted appropriation or exploitation of the Plaintiff's personality for their own benefit and reputation.

184. As a proximate result of the wrongful conduct of the 18CD, individually, jointly and severally, the Plaintiff proximately suffered economic, psychological, physical and related injuries for which he is entitled to recover compensatory, punitive and other damages, including attorney fees, costs and interest.

NINETEENTH CAUSE OF ACTION

185. Plaintiff incorporates paragraphs one (1) through one hundred eighty four (184) as if fully rewritten herein.

186. This cause of action is brought pursuant to state law.

187. All Defendants are guilty of wanton misconduct under the common law and statutory law of Ohio. Some conduct of all said Defendants was negligent and outside their immunity status and is also actionable.

181. The Plaintiff is entitled to recovery for his injuries for all the aforesaid conduct listed in the preceding Seventeen Counts, which proximately resulted in injuries to him, and all damages hereafter alleged are averred to be presented in each cause of action as if fully rewritten previously. The injuries are permanent in nature and will continue into the future, including, but not limited to:

1) Past, Present, and Future lost wages, loss of income, loss of earning capacity, diminishment of earning ability, costs of vocational rehabilitation, and all other injuries resulting in economic losses;

2) Past, Present and Future disability, scarring, disfigurement, loss of body function, pain, suffering, emotional distress, loss of reputation, related psychological and physical injuries, and all other injuries to the body, person, soul, and psyche;

3) Past, Present and Future loss of enjoyment of life;

4) Past, Present and Future medical expenses;

5) Other related economic, psychological and physical injuries not heretofore enumerated;

6) Attorney fees, costs, interest, and other litigation related expenses; and

7) All injuries provided under state or federal statute and common law, not heretofore expressed.

Wherefore, Plaintiff demands judgment, jointly and severally, against the Defendants for TEN MILLION DOLLARS ($10,000,000.00) in compensatory damages and TEN MILLION DOLLARS ($10,000,000.00) in punitive damages, together with pre-judgment interest, post-judgment interest, the Plaintiff's reasonable attorney fees and costs (pursuant to 42 U.S.C. 1988 and State Law) and for such other and further relief to which he may be deemed entitled either at equity or at law.

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Attorneys for Plaintiff

JURY DEMAND

Plaintiff respectfully demands a trial by jury on all issues presented herein.

/s/ Dwight D. Brannon
Dwight D. Brannon

/s/ Jose M. Lopez
Jose M. Lopez

AFFIDAVIT

STATE OF OHIO)
)
COUNTY OF MONTGOMERY)

STEPHEN MICHAEL RIDDER, being first duly cautioned and sworn according to law, deposes and states that the foregoing statements are true and correct to the best of his knowledge.

/s/ Stephen Michael Ridder
STEPHEN MICHAEL RIDDER

Sworn to before me, a Notary Public, and subscribed in my presence this /s/ Salli Ann Subler

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following coins of record by mailing a copy of same this 7th day of May, 1992:

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/s/ Dwight D. Brannon
Dwight D. Brannon

Exhibits Not Attached to this Appendix.

(2)

Supreme Court, U.S.
FILED
NOV 17 1997
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No. 97-560

In The
Supreme Court of The United States
October Term 1997

STEPHEN MICHAEL RIDDER
Petitioner.

v.

CITY OF SPRINGFIELD, et al.
Respondent.

On Petition For Writ of Certiorari To the United States Court of Appeals For The Sixth Circuit

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Petitioner's Reply Brief to Respondent Lawrence

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*Attorney for Petitioner

PARTIES

1. For Petitioner: Stephen Michael Ridder, Plaintiff-Appellant.

2. For Respondents: City of Springfield, Ohio; Clark County, Ohio; Gene A. Kelly; Roger Evans; Robert Marcum; Ronald Menda; Robert Kerr; Dr. Walter Lawrence, Defendant-Appellees.

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REPLY TO BRIEF IN OPPOSITION

Respondent, Dr. Walter Lawrence's recollection of the facts in this case clearly demonstrate the need for this Court to comprehensively review the factual record. From even a brief review of the facts, it is very evident that Respondent Lawrence acted with complete and deliberate indifference to the medical needs of Petitioner Stephen Ridder during the period of his confinement in jail for a crime he obviously did not commit.

Respondent Lawrence inappropriately indicates that he should be absolved of any liability in this case because he formulated medical opinions that Petitioner Ridder did not need or require physical therapy because it "would not medically benefit the injured hand and that no ongoing need for medication existed." It seems that Respondent Lawrence maintains that his professional opinion can outweigh that of a treating physician who knew more about Petitioner Ridder's injury and the required regimen of therapy necessitated by the fact that there was going to be a future surgery on the hand. Also, it was obvious that Respondent Lawrence cannot dispute the fact that he was well aware of the need for therapy as his own records noted the severity and debilitating effects of the hand condition.

The factual record in this case is clear that Petitioner Ridder did not receive any of the required physical therapy until late October, 1988, well over a month after Respondent Lawrence's initial examination. Throughout the time period ranging from Respondent Lawrence's initial examination to Petitioner Ridder's release from jail, Respondent Lawrence had notice of Petitioner Ridder's serious medical needs. This is verified by not only Respondent Lawrence's own records and notations, but also through direct verbal communication with Petitioner Ridder. Despite this knowledge, Respondent Lawrence did nothing and was deliberately indifferent to Petitioner Ridder's medical needs. Because Lawrence did not render proper medical treatment despite Petitioner Ridder's pleas, Petitioner Ridder's hand condition quickly deteriorated. Ultimately, this resulted in

numerous surgeries to correct problems of Petitioner Ridder's hand. Even to present, Petitioner Ridder has a permanent disability in his hand.

ARGUMENT

This Honorable Court should not be persuaded by Respondent Lawrence's arguments in this matter as the factual record clearly indicates that summary judgment in his favor was not warranted at the District Court level. Petitioner, Stephen Ridder, has set forth five substantial reasons that clearly justify the issuance of a writ of certiorari in this matter. Respondent Lawrence's Opposition Brief, however, only addresses two of Petitioner Ridder's five issues presented for review. Therefore, in the interests of clarity and brevity, Petitioner Ridder will only address the two issues presented in Respondent Lawrence's Brief in Opposition.

I. There were genuine issues of material fact concerning Petitioner's Section 1983 and medical malpractice claims which warranted a denial of Respondent Lawrence's motion for summary judgment.

In this case, the combination of the acts and omissions on the part of all the Respondents caused Petitioner Ridder to suffer greatly as a result of Respondents' abuse of their governmental power. Specifically, Respondent Lawrence's acts and omissions in the medical treatment, or lack thereof, of Petitioner Ridder is actionable under 42 U.S.C. § 1983 and medical malpractice laws. The Respondents, including Lawrence, cannot be relieved of liability for completely ignoring Petitioner Ridder's serious medical needs which he was a detainee and inmate of the Clark County Jail. Because Petitioner Ridder

presented more than sufficient evidence for his claims asserted against Respondent Lawrence, summary judgment was improvidently granted and affirmed in this case.

The Due Process clause of the Fourteenth Amendment to the United States Constitution has been interpreted by this Court as requiring governmental agencies to provide medical care to pretrial detainees by administering prompt medical attention once the government is aware of the need for such attention. *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244-45 (1988). To maintain an actionable claim under the Due Process clause and section 1983, the plaintiff's evidence must demonstrate that the prison officials, which would include the jail physicians, were deliberately indifferent to the medical needs of their prisoners. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Sosebee v. Murphy*, 797 F.2d 179 (4th Cir. 1978); *Fitzke v. Shappell*, 773 F.2d 720 (6th Cir. 1972). In proffering evidence to establish "deliberate indifference," the plaintiff need not prove that the prison officials consciously sought to inflict pain by withholding treatment. All a plaintiff is required to demonstrate is that more than mere negligence existed. *See Estelle*, 429 U.S. 97.

In this case, Petitioner Ridder clearly vocalized his serious medical needs to jail officials. This is supported by the fact that he reported his medical condition and need for therapy three times a week on his receiving-screening form that was completed on September 8, 1988. Respondent Lawrence was cognizant of the contents of this form as it was included in the chart that was prepared for the doctor prior to his examination of Petitioner Ridder.

Even if Respondent Lawrence failed to review Petitioner Ridder's response to question 26 on the receiving-screening form included in Petitioner Ridder's chart, the evidence clearly establishes that Petitioner Ridder specifically informed Respondent Lawrence of his need for therapy during the September 14, 1998 examination. Further,

Petitioner Ridder also informed Respondent Lawrence during the examination that he had been on pain medication, but had not taken any since his arrest and confinement because he did not have it with him and that the deputies instructed Petitioner Ridder that they could not administer medication without a prescription by the jail physician. Respondent Lawrence even made notations in the chart indicating the severity and debilitating effects of the hand injury to the nerves and tendons in the left hand and that the hand was pale as a result of insufficient blood supply.

Despite the uncontroverted facts, Respondent Lawrence deliberately chose to be indifferent to the serious medical condition of Petitioner Ridder. Petitioner Ridder was in need of his scheduled physical therapy which was a mandatory course of treatment in direct preparation for Petitioner Ridder's future surgery. Moreover, the physical therapy was necessary to facilitate proper healing of the left hand. Taken as a whole, Petitioner Ridder's hand injury was unquestionably a serious medical need. Not only was Petitioner Ridder prevented from attending his necessary and required physical therapy, but Respondent Lawrence plainly told Petitioner Ridder that he would not be transported to the hospital for his therapy and that he would receive proper care once he was in prison.

In addition, Petitioner Ridder was not given pain medication to alleviate his suffering, despite his repeated requests. Respondent Lawrence was keenly aware of Petitioner Ridder's need for pain medication as this was discussed during the September 14, 1988 examination. Yet, Respondent Lawrence overlooked these comments because he inappropriately opined that such medication was not needed.

After Petitioner Ridder's initial examination, Respondent Lawrence never saw or evaluated Petitioner Ridder's condition. Although Respondent Lawrence was completely aware of Petitioner Ridder's serious medical

needs, Respondent Lawrence did nothing. As the Sixth Circuit and other circuits have held, such inaction by prison officials amounts to deliberate indifference for the purpose of establishing section 1983 liability.

Inasmuch as summary judgment was not warranted for the section 1983 claim, the granting of summary judgment to Respondent Lawrence on the state law claims for medical malpractice was inappropriate. Supplemental jurisdiction existed over this state law claim, as the factual allegations which served as the basis for the section 1983 claims also established medical malpractice.

Under Ohio medical malpractice law, the plaintiff must show that the injury complained of was caused by the omission or failure to do some particular thing or things that a similar physician would have done under similar circumstances and that the injury was the proximate result of the omission. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127. Reckless or indifferent conduct also constitutes medical malpractice under Ohio law. *Newton v. Ohio University School of Osteopathic Medicine* (1993), 91 Ohio App.3d 703.

Contrary to Respondent Lawrence's assertions, Petitioner Ridder has demonstrated a complete failure by the Respondent Lawrence to properly treat and care for his medical needs. Respondent Lawrence's arguments that Petitioner Ridder did not present any facts to refute the affidavit testimony of Lawrence is misplaced because the facts proffered in opposition to the summary judgment motion unequivocally indicated that Respondent Lawrence was derelict in his medical treatment of Petitioner Ridder's serious medical needs.

Because of these compelling facts, the District Court inappropriately granted summary judgment in favor of Respondent Lawrence. This Honorable Court must grant a writ of certiorari in this case to prevent a gross miscarriage of justice.

II. Petitioner was prejudiced by the Magistrate's conduct in the case because it effectively deprived Petitioner substantial justice.

Petitioner Ridder has demonstrated that the conduct of the United States Magistrate prejudiced Petitioner Ridder's pursuit of claims against Respondent Lawrence based upon the violations of Petitioner Ridder's civil and constitutional rights. The Magistrate's open hostility to Petitioner Ridder and his counsel is evident in the Magistrate's improper procedural rulings which eviscerated the case. In finding that there was no impropriety in the Magistrate's conduct, the Sixth Circuit has departed from accepted standards set forth by this Court regarding the impartiality of decision-makers.

As an example of the Magistrate's lack of impartiality, open hostility to Petitioner's counsel, and desire to expeditiously remove this case from his docket, the Magistrate prejudiced Petitioner Ridder's case by precluding Petitioner Ridder from utilizing his experts for failure to comply with Fed.R.Civ.P. 26(a)(2), as amended December 1, 1993. Respondent Lawrence inappropriately argues that the Magistrate's decision regarding the prohibition of naming experts did not result in the granting of summary judgment in its favor. Such an argument is clearly contradictory to Respondent Lawrence's prior position in his Opposition Brief wherein he alleges that Petitioner Ridder did not present evidence indicating that he deviated from an acceptable medical practice. How else could Petitioner Ridder further demonstrate Respondent Lawrence's medical malpractice other than the obvious facts indicating liability without having his treating physicians give their expert reports? Certainly, this Honorable Court can see through Respondent Lawrence's ill attempts to negate the fact that

Petitioner Ridder was prejudiced in his prosecution of this case by the Magistrate's conduct.

This case was originally filed on January 4, 1990. App. 193. After a procedural odyssey of events, the final Third Amended Complaint, that Petitioner Ridder was required to "stand or fall" upon, was filed on August 17, 1993. App. 343. Therefore, at the time when the Complaint and subsequent amendments were filed, Fed.R.Civ. P. 26 had not been amended.

Amendments to the Federal Rules of Civil Procedure may be applicable to then-pending cases, unless "to the extent that in the application of such rule in such proceedings would not be feasible or would work injustice..." 28 U.S.C. § 2074. In adopting the amendment to Fed.R.Civ.P. 26, this Honorable Court even stated that "this and all other rules amended effective December 1, 1993, are applicable to litigation pending on that date insofar as just and practicable." *Order adopting amendments to the Federal Rules of Civil Procedure*, 113 S. Ct. 475, 477 (1993).

Although the case was pending prior to the adoption of amendment to Civil Rule 26 and some of Petitioner Ridder's expert reports were already provided, these expert reports were held to the requirements of the amended Civil Rule 26. For example, the report of one of the investigators in the case, Richard Emmons, had been provided to the court and opposing counsel as an attachment to the Petitioner's Motion for Summary Judgment, filed in May, 1991. App. 262. Clearly, this report did not and should not have fallen within the provisions of the amended Rule as it had already been filed with the Court.

Moreover, throughout the litigation, Drs. Kaehr, Barre, Duncan, and Sammarco were disclosed as expert witnesses because of their status as Petitioner Ridder's treating physicians. The Magistrate overlooked the Advisory Committee Notes which provide that treating physicians may provide testimony without any requirement for a written

report. Specifically, the Advisory Committee Notes to the amended Rule 26 unambiguously stated, "a treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report."

Obviously, the Magistrate's ruling prejudiced Petitioner Ridder's case against Respondent Lawrence because the inappropriate preclusion of the treating physicians expert opinions denied Petitioner Ridder the opportunity to present even more compelling evidence that Respondent Lawrence's medical treatment, or lack thereof, deviated from the appropriate standard of care given the factual circumstances of the case. Therefore, the application of the amended rule to the case and exclusion of Petitioner Ridder's experts at bar worked an injustice on Petitioner Ridder which clearly played a pivotal role in the outcome of the summary judgment motion filed by Respondent Lawrence.

In this case, application of the amended Rule was neither practicable or just. The exclusion of all of Petitioner Ridder's proposed expert witnesses completely eviscerated the Petitioner's case, and amounted to an abuse of discretion. However, the Magistrate's ruling did not effect Respondents' abilities to name experts. In fact, the Respondents never filed such expert reports and their experts were never barred. Therefore, the application of the amended Rule and exclusion of the treating physicians was erroneous. Indeed, justice was not deemed served.

Respondent Lawrence also attempts to defend the Magistrate's obvious hostility and personal ire towards Petitioner Ridder and his counsel. Indeed, there is no defense to the Magistrate's open displays of hostility and intemperance towards Petitioner Ridder's counsel.

With respect to Petitioner Ridder's section 1983 claim against Respondent Lawrence, the Magistrate held Petitioner Ridder to a more rigid pleading standard than the standard set forth in Fed.R.Civ.P. 8. The Magistrate

certainly held Petitioner Ridder to an arbitrary standard that required significantly more than what federal courts have determined that heightened pleading standard to be.

In addition, the Magistrate was consistently impatient in this case. For example, in the Magistrate's January 24, 1994 Order, the Magistrate reviewed the pleading history of the case to that date and determined that the pleading difficulties were solely the fault of Petitioner Ridder and his counsel. Without justification the Magistrate held that no other amendments were to be allowed because three opportunities had been given to amend; hence, "the case, and individual claims within it, must stand or fall on the Third Amended Complaint." App. 77-78. The Magistrate's stating that Petitioner Ridder's had to "stand or fall" with the Third Amended Complaint ignores and even contradicts the liberality of Fed.R.Civ.P. 15.

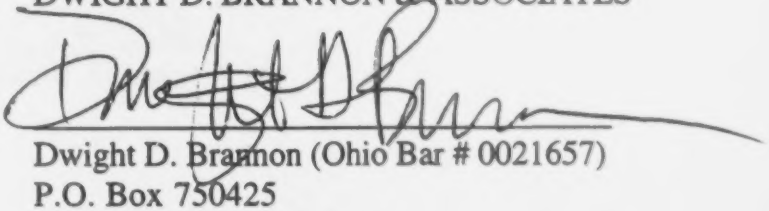
The Magistrate's decision was predicated on an incorrect belief that the length of time which elapsed by the pleading stage was solely upon Petitioner Ridder. Had the Magistrate correctly reviewed the record, it would have been evident that the time delays were also the fault of the Magistrate himself as he took seventeen (17) months to rule on pending motions to dismiss and for judgment on the pleadings. Therefore, it is obvious that the Magistrate's hostility and ire toward Petitioner Ridder and his counsel prejudiced the case, thereby denying substantial justice.

Moreover, the Magistrate disposed of this matter by entering summary judgment for all of the Respondents and against Petitioner Ridder on all of his claims. The Magistrate did so despite the fact that some 13 months earlier, he had denied the Respondents' Motion for Summary Judgment and no new facts had arisen in the case. From this fact alone, it is evident that Petitioner Ridder's case was prejudiced by the lack of impartiality and open hostility of the Magistrate. Therefore, Petitioner Ridder prays that this Honorable Court grant Certiorari in the case at bar.

CONCLUSION

Petitioner Stephen Ridder urges this Honorable Court to grant certiorari to resolve the injustice that has occurred in this case. Contrary to Respondent Lawrence's mistaken conclusions, there are significant compelling reasons for this Honorable Court to grant the writ. The factual record coupled with the inappropriate application of amended Fed. R. Civ. P. 26(a)(2)(B), effectively insured that justice could not prevail in this case. A review by this Honorable Court is most appropriate in this case so that a meaningful remedy under the law can be provided. Therefore, Petitioner Stephen Ridder respectfully prays that this Honorable Court grant a writ of certiorari.

Respectfully submitted,
DWIGHT D. BRANNON & ASSOCIATES



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing have been served upon Leo F. Krebs, Esq., Attorney for Respondent Lawrence, Suite 400, National City Center, 6 North Main Street, Dayton, Ohio 45402; Edward J. Dowd, Esq., Attorney for Respondents Clark County, Ohio, and Gene Kelly, 205 East First Street, Dayton, OH 45402; John R. Butz, Esq., Attorney for Respondents Evans, Marcum, Menda, and Kerr, 125 East McCreight Avenue, Springfield, OH 45504; and Robin N. DeBell, Esq., Attorney for Respondent City of Springfield, 76 East High Street, Springfield, OH 45502; by regular U.S. mail this 17 day of November, 1997.

Dwight D. Brannon

(3)

Supreme Court, U.S.
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No. 97-560

In The
Supreme Court of the United States
October Term, 1997

STEPHEN RIDDER,

Petitioner,

v.

CITY OF SPRINGFIELD, ET AL.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

RESPONDENT WALTER LAWRENCE'S BRIEF IN OPPOSITION

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2488

I. QUESTIONS PRESENTED FOR REVIEW

The petitioner sets forth five issues which he seeks to have this Court review. The following questions more appropriately frame the issues as they relate to Dr. Lawrence:

A. Does a violation of 42 U.S.C. §1987 occur where the evidence fails to disclose that a physician was deliberately indifferent to a serious medical need?

B. Did the conduct of the magistrate deprive the petitioner of substantial justice?

II. PARTIES TO THE PROCEEDING

The petition accurately lists the parties to this proceeding. At the trial court level this action also involved the Clark County Prosecutor Steven A. Schumaker whom the petitioner voluntarily dismissed.

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IV. STATEMENT OF THE CASE

Contrary to the contentions of the petitioner, this action does not involve deliberate indifference to a serious medical need or conduct of the magistrate which resulted in "one of the grossest miscarriages of justice imaginable." Rather, it involves the failure of the petitioner to present evidence sufficient to overcome the summary judgment motion filed by Dr. Lawrence and the repeated failure of the petitioner to obey orders issued by the magistrate.

Dr. Lawrence did not serve as a contract (jail) physician during the petitioner's entire time of incarceration at the Clark County jail, but only for the time period of September 7, 1998 up through October 16, 1988. On September 14, 1988, pursuant to a policy of the Clark County Jail which required physical examination of a person whose incarceration was expected to last more than ten days, Dr. Lawrence performed a screening physical on the petitioner.

The screening physical included the taking of a medical history and the performance of a physical exam.

As a part of the medical history, the petitioner explained that he had cut his hand in July of 1988 when a guard came off a circular type saw. The petitioner never complained of any ongoing hand pain nor did he ask for any pain medication.

The physical examination disclosed that as a result of the circular saw accident the petitioner, prior to his incarceration, had received a severely debilitating injury to his hand which had resulted in loss of function of some blood vessels, nerves and tendons. This examination revealed that the petitioner had no open wound, had no chance of infection and had no need for any urgent or emergent medical treatment. The physical exam raised no medical concerns and Dr. Lawrence felt that the petitioner would not incur any further complication from the hand injury.

The screening physical resulted in Dr. Lawrence formulating medical opinions that the petitioner did not require physical therapy from a physical therapist, that physical therapy would not medically benefit the injured hand and that no ongoing need for medication existed. If a need for medication arose, a standing order issued by Dr. Lawrence permitted the jail nursing personnel to provide pain medication.

After the September 14 screening physical, Dr. Lawrence never received any request from the petitioner pertaining to surgery, never received anything from the petitioner's treating surgeon, and never had any knowledge of any scheduling of any further surgical procedure. The petitioner acknowledged that Dr. Lawrence never denied him any medication; that from September 14 up until November 1 when he started complaining about a toothache; he never made any formal written complaint concerning any claim

relating to an alleged denial of medical care or medication; he never called his mother or father to complain about any denial of medical care or medication; he never attempted to contact Dr. Lawrence; he never directed any request to any jail medical personnel for therapy; and from September 8 up until he started having trouble with a tooth in November, he never mentioned to any Clark County deputy any need for medical care or attention. Although the petitioner claims otherwise, Dr. Lawrence unequivocally testified that the likelihood of subsequent imprisonment in a state penitentiary played no role in the determination of any surgical procedure, physical therapy or treatment.

Dr. Lawrence, in his affidavit, provided the only admissible summary judgment evidence relating to any alleged deliberate indifference to a serious medical need and the state tort claim of medical malpractice. In his affidavit, Dr. Lawrence opined that at the time of the physical exam the

petitioner did not have any complication arising from the injury to his hand and the petitioner did not need any urgent or emergent medical care. Dr. Lawrence also expressed the medical opinions that he did not deny the petitioner appropriate medical care or treatment, did not deviate from any acceptable medical practice and that any alleged malpractice did not proximately result in any injury to the petitioner.

On January 4, 1990 the petitioner filed a complaint with the federal district court. This complaint included a section 1983 claim and a medical malpractice claim. The petitioner then proceeded to amend his complaint three separate times, the last amendment occurring on August 17, 1993. App. 343.

In late August of 1993 Dr. Lawrence filed an answer to the third amended complaint. This answer set forth various affirmative defenses, including the defense of qualified

immunity. In a motion for judgment on the pleadings filed on October Dr. Lawrence asked the trial court to determine the validity of the various defenses raised in his answer. Seventeen days later, without the benefit of any opposing memorandum, the magistrate, on October 18, denied the motion for judgment on the pleadings. App. 60.

The trial court also denied Dr. Lawrence's motion for severance and his request that the petitioner notify him whether the deposition of any person would relate to any claim against him. The trial court did grant the motion of Dr. Lawrence to bifurcate the medical treatment claims from the other non-medical claims. App. 117.

In a January 25, 1994 order setting a scheduling conference date, the magistrate ordered the parties to prepare and file a joint discovery plan. A portion of this plan, submitted by the parties on February 10, required the petitioner on or before May 15, 1994 to disclose experts and

to provide a report setting forth the opinions of each expert. The magistrate also issued an order which (1) required that the expert reports comply with Fed. R. Civ. R. 26(a)(2) and (2) called attention to the civil rule changes pertaining to expert reports.

On May 16, 1994 the petitioner filed purported expert reports. Since these reports did not comply with Rule 26(a)(2), the magistrate in an order filed in the middle of May of 1994, pointed out the deficiencies and granted the petitioner an additional fifteen days to correct the deficiencies. App. 108. The petitioner on May 23 filed a pleading to which he attached letters written by four physicians and a psychologist. Since this pleading and the attachments failed to conform to Rule 26(a)(2), the magistrate on June 2 struck these letters and held that these witnesses could not testify (expert preclusion order). App. 112. The petitioner then filed a motion seeking modification of the

preclusion order and requested an additional thirty days to comply with the expert report rule. The magistrate on July 11 denied this motion without prejudice to a reconsideration motion conditioned upon a showing of excusable neglect and upon the petitioner furnishing expert reports which complied with Rule 26(a)(2). App. 122.

Dr. Lawrence disclosed his experts and submitted a proper Rule 26(a)(2) expert report on August 12. After the discovery cut off date and after Dr. Lawrence submitted a summary judgment motion, the petitioner, on January 23, 1995, filed a motion seeking modification of the expert preclusion order. Part of this submission consisted of (a) a claim of excusable neglect predicated on counsel's ignorance of the law and (b) additional data from a psychologist and a non-treating physician. The magistrate, in a January 25 order, chronicled the history of the expert preclusion order, found an absence of excusable neglect and refused to modify the

previous preclusion order. App. 137. Some five days later, the petitioner filed another motion seeking modification of the expert preclusion order. Finding that the absence of the required expert reports resulted in none of the defendants deposing any expert identified by the petitioner, the magistrate stated:

> The Court has employed the sanction of excluding witnesses only as a last resort. When Plaintiff first failed to comply, the Court sua sponte allowed additional time within which to do so. Plaintiff failed to comply by the second deadline at the end of May and as late as July 11, the Court indicated its willingness to reconsider the exclusion if Plaintiff would actually file the required reports. It was only six months later, after discovery cut-off and summary judgment motions were filed, only six weeks before trial, that Plaintiff attempted to comply and then with supplemental reports which had apparently been in Plaintiff's hands since August 1994. As several Defendants note, Fed. R. Civ. P. 37 requires a preclusion of expert witnesses who are not properly

> disclosed unless there was substantial justification and the failure was harmless. Neither exception applies here. App. 161.

In opposition to the summary judgment motion filed by Dr. Lawrence on December 30, 1994, the petitioner filed unverified statements of two physicians. Dr. Lawrence moved to strike these unverified letters as well as the deposition testimony of the petitioner which purported to express medical opinions and medical conclusions. The trial court on February 28, 1995, granted the motion to strike and granted the summary judgment motion of Dr. Lawrence. App. 163.

The petitioner appealed the order granting summary judgment to the Sixth Circuit Court of Appeals. The latter appellate court, in rejecting the same contentions made by the petitioner in his certiorari petition, on March 13, 1997, upheld the order granting summary judgment. App. 1. The appellate

court also denied a motion for a rehearing en banc which the petitioner filed on April 28, 1997. App. 191.

V. REASONS FOR DENYING THE PETITION

The petition sets forth no reason which justifies the issuance of a writ of certiorari. While the petitioner alleges a conflict with decisions of other federal circuits, he cites no such decisions. In fact, the decision of the Sixth Circuit does not conflict with any other federal appellate decision. The petition does not involve any interpretation of any federal statute nor does it involve a departure from acceptable judicial conduct. Rather, the petitioner seeks yet another factual review of an appellate decision which the Sixth Circuit, after conducting a de novo review and after viewing all the facts and inferences in a light most favorable to the respondent, found that the magistrate correctly granted summary judgment to Dr. Lawrence.

A. The Absence of Any Genuine Issue Of Fact With Respect To The Section 1983 And Medical Malpractice Claims Required The Granting Of Summary Judgment.

Failure to provide adequate medical care to a non-indicted detainee violates the Due Process Clause of the Fourteenth Amendment and section 1983 provided the evidence discloses a deliberate indifference to a serious medical need. City of Revere v. Massachusetts General Hospital, 463 U.S. 239 (1988); see, Estelle v. Gamble, 429 U.S. 97, 104 (1976). Inasmuch as the evidence presented by Dr. Lawrence revealed that the petitioner did not need any urgent or emergent medical care and did not need any pain medication, the petitioner bore the burden of coming forward with factual evidence which created a genuine issue of fact as to the existence of a serious medical need. Celotex Corp. v. Caterett, 477 U.S. 317, 324 (1986). The petitioner failed to present any such evidence and the appellate court properly

sustained the order granting summary judgment to Dr. Lawrence.

Although the petitioner had sustained a severe injury before his incarceration, the undisputed evidence established that during the period of time Dr. Lawrence served as the jail physician the petitioner did not have a serious medical condition. Whether the petitioner needed further physical therapy or treatment was not obvious or a matter of common knowledge. The issues of therapy and treatment entail a "classic example of a matter for medical judgment" and do not involve deliberate indifference to a serious medical need. See, Estelle v. Gamble, supra at 107.

In order to establish a claim for medical malpractice, the petitioner had to produce some admissible evidence showing that Dr. Lawrence deviated from an acceptable medical practice or standard and that this deviation proximately resulted in an injury. Bruni v. Tatsumi, 46 Ohio

St.2d 127, 436 N.E.2d 73 (1976). The petitioner offered no evidence whatsoever to contradict the affidavit testimony of Dr. Lawrence that the latter did not deviate from any acceptable medical practice or standard and that any alleged deviation did not proximately result in any injury to the petitioner.

As stated by the Sixth Circuit, the petitioner's

> evidence in opposition to summary judgment is manifestly lacking. Undoubtedly, Ridder's counsel is aware that unsworn, and even unsigned, letters do not amount to admissible evidence. Ridder has thus failed to show facts giving rise to a genuine issue concerning Dr. Lawrence's deliberate indifference to serious medical needs or medical malpractice.

Ridder v. City of Springfield, No. 95-3358 (6th Cir. Mar. 13, 1997) (App. 1).

B. The Conduct Of The Magistrate Did Not Deprive The Petitioner Of Substantial Justice.

The petitioner, in his third question presented for review, claims that a denial of substantial justice resulted from the magistrate's (a) requiring adherence to more stringent pleading requirements, (b) enforcement of Rule 26 as it relates to disclosure of expert reports and (c) hostility toward counsel for the petitioner.

Dr. Lawrence's answer raised the defense of qualified immunity. By virtue of Veney v. Hogan, 70 F.3d 917, 919 (6th Cir. 1995) a complaint containing a section 1983 action against a government official must satisfy a heightened standard of pleading when a defendant raises the defense of qualified immunity. This heightened standard did not in any way affect the petitioner. The magistrate specifically found that the third amended complaint adequately pled facts to overcome Dr. Lawrence's defense of qualified immunity.

App. 60, 68. Further, any alleged heightened pleading requirement did not affect any substantial right of the petitioner since he took the depositions of Dr. Lawrence and the other defendants in June and July of 1994 and he had the deposition transcripts available at the time Dr. Lawrence filed the summary judgment motion. Thus, the petitioner could not have conceivably incurred any prejudice from any heightened pleading requirement..

Rule 26(a)(2) and (b) provide that a party proposing to use a witness retained or specifically employed to provide expert testimony must not only name the individual but must also submit a signed written report setting forth the opinions which the expert will express at trial. The magistrate held that the preclusion order did not apply to treating physicians "so long as they do not purport to testify beyond the scope of their own diagnosis and treatment ..." App. 149. As detailed in the preclusion order, the magistrate precluded the expert

testimony only after the petitioner, through repeated violations of the orders of the magistrate, failed to produce the required expert reports.

The magistrate, before commencement of discovery and in the middle of February 1994, advised counsel of the changes in the federal rules and of the new requirements relating to the filing of expert reports. After the petitioner claimed excusable neglect, the magistrate on July 11, 1994 indicated a willingness to review the preclusion order provided the petitioner demonstrated excusable neglect and submitted the required reports. The petitioner never filed any pleading claiming excusable neglect or filed any purported complying expert report until January 23, 1995; some ninety days after the discovery cut off, some twenty days after the filing of summary judgment motions and some six weeks before the scheduled trial. Under these circumstances, the

magistrate appropriately implemented the sanction of preclusion.

Even if the magistrate had made some error with respect to the preclusion order, this order did not result in the granting of summary judgment to Dr. Lawrence. The trial court granted and the appellate court sustained the order granting summary judgment because the petitioner failed to produce admissible evidence which established the existence of any serious medical need or any medical malpractice.

The contentions of the petitioner that the magistrate's personal feeling and hostility somehow entered into the granting of the summary judgment do not provide any basis for granting a writ of certiorari. As found by the Sixth Circuit and as supported by the evidence, the magistrate extended the petitioner every opportunity to litigate his claims. To paraphrase the appellate court, the magistrate gave the petitioner "every reasonable opportunity to litigate" his

claims and the magistrate has no responsibility for the "shortcomings" and the failure to "follow through" of his counsel. App. 11

VI. CONCLUSION

No compelling reason exists for this Court to grant for a writ of certiorari. Granting the writ, under the facts of this case, will require this Court to grant certiorari whenever a petitioner disagrees with the factual determinations made by a trial court and affirmed by an appellate court. This Court, accordingly, should deny the petition for writ of certiorari.

Respectfully submitted,

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